Supreme Court, U.S.
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No. 06-313

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

APPENDIX TO PETITION
VOL. I OF II

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 03-2880/2938

William Weaver,	*	
	*	
Appellee/Cross-Appellant,	*	
	*	Appeals from the
v.	*	United States District
	*	Court for the Eastern
Michael Bowersox,	*	District of Missouri.
	*	
Appellant/Cross-Appellee.	*	

Submitted: September 13, 2004
Filed: February 16, 2006 (Corrected 2/23/06)

Before BYE, BOWMAN, and MELLOY, Circuit Judges.

MELLOY, Circuit Judge.

The State of Missouri appeals the grant of habeas relief to William Weaver. The district court[1] concluded that the prosecutor's closing arguments during the penalty phase of Weaver's capital murder trial violated the United States Constitution. Weaver cross-appeals the denial of his claim that the prosecutor made improper closing arguments during the guilt phase of the trial. We affirm.

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[1]The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

I.

In separate Missouri state court trials held in 1988, William Weaver and Daryl Shurn were convicted of the execution-style shooting death of Charles Taylor. Taylor was an acquaintance of Shurn who was going to testify against Shurn in a drug case. Shurn hired Weaver to kill Taylor, and Weaver was convicted of doing so.

During his closing argument in the penalty phase, the prosecutor made a series of statements relevant to the claims in this matter. In a claim the parties identify as Claim 2E, the prosecutor made the following statements:

> So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty.

Weaver's trial counsel objected to the statements as improper and misstatements of the law. The state trial court sustained the objection and issued a curative instruction for the jury to disregard the statements.

In a claim the parties identify as Claim 2F, the prosecutor made the following statements:

> Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?

> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all know that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in the pile of goo that a moment before was your best friend's face, you'll know what to do.

Defense counsel objected to the statements as improper on the grounds that they were intended to inflame and prejudice the jury. The state trial court overruled the objection.

Finally, in a claim the parties identify as part of Claim 2M, the prosecutor made statements that Weaver contends improperly focused the jury on society's general war on drugs, urged the jury to sentence Weaver to death merely to send a message to other drug dealers, and caused the jury to ignore its obligation to individualize its sentencing consideration by focusing on the particular facts involved in his case:

> It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the Williams Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when

you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn?

Of course, you would. It would have been self-defense. Well, it was right to kill then and it's right to kill him now.

. . . .

This case - I guess it's the one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.

When it comes time after [defense counsel] talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business.

. . . .

And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealer, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced you're guilty, we're going to give you life in prison? That's not the right message.

. . . .

The message has to be death for these types of people. That's the only message they are going to understand.

The one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It doesn't just pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that.

. . . .

> You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do.
>
> . . . .
>
> It's bigger than William Weaver. And you've got to have the guts to do it. I'm the P. osecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't.

Weaver's counsel objected to the last statement regarding the prosecutor being the top law enforcement officer in the county who chooses the cases in which to pursue the death penalty. The trial court sustained the objection to that statement, and instructed the jury to disregard it.

The jury sentenced Weaver to death for his role in the offense.

After exhausting his state post-conviction remedies, Weaver filed a petition in federal district court under 28 U.S.C. § 2254, which, after amendment by counsel, raised twenty-two separate claims for relief. The district court granted relief on the first of those claims that Weaver's Fourteenth Amendment rights were violated when the prosecutor exercised two peremptory strikes against black venirepersons during jury selection. The State of Missouri appealed. This court reversed and remanded with instructions to address the

remaining twenty-one issues raised in Weaver's petition. Weaver v. Bowersox, 241 F.3d 1024, 1032 (8th Cir. 2001).

On remand, the district court again granted relief, this time on three claims related to improper closing arguments the prosecutor made during the penalty phase of Weaver's trial. The district court vacated the death sentence, and ordered that Weaver either be sentenced to life in prison without the possibility of parole or be given a new penalty-phase trial. The district court denied relief on all other claims, but granted a certificate of appealability on two claims related to closing arguments the prosecutor made during the guilt phase of Weaver's trial.

II.

We first briefly address the cross-appeal. In claims the parties identify as 2B and 2C, Weaver contends the prosecutor made six statements during the guilt-phase closing argument and rebuttal which improperly referred to the prosecutor's personal beliefs or threatened the jury. A discussion of the actual statements is not necessary because the district court determined the claims had been procedurally defaulted. As a consequence, Weaver has to show "cause and prejudice" or a "fundamental miscarriage of justice:" to have the claims reviewed. See Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("[F]ederal habeas review of [a procedurally defaulted claim] is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice.").

The district court determined Weaver failed to show cause and prejudice or demonstrate a fundamental miscarriage of justice arising from the failure to consider the claims. In an abundance of caution, the district court addressed the merits of

the claims and determined the statements did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986).

On appeal, Weaver does not address the procedural default issue. He does not argue there was cause and prejudice or that a fundamental miscarriage of justice occurred. By failing to address the procedural default issue, he has abandoned his cross-appeal. See, e.g., Etheridge v. United States, 241 F.3d 619, 622 (8th Cir. 2001) ("Claims not argued in the briefs are deemed abandoned on appeal."). We therefore decline to review the merits of Weaver's cross-appeal.

III.

We next turn to the issue of whether Weaver's claims are subject to the strictures placed on our review by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Weaver argues the Missouri Supreme Court did not address the "war on drugs" claims set out in Claim 2M. Our review of the Missouri Supreme Court decision leads to the conclusion that although the war on drugs claims were not specifically discussed, the Missouri Supreme Court did address the claims in a conclusory fashion that is sufficient to bring the case under AEDPA.

The Missouri Supreme Court addressed the appellant's claims about the prosecutor's emphasis on his position as the elected prosecutor in Section IV.A. of the opinion and a claim the prosecutor accused defense counsel of suborning perjury in closing argument in Section IV.B. Those claims were discussed in considerable detail by the Missouri Supreme Court. The Supreme Court then went on to discuss the arguments raised in Weaver's "Other Argument Section" of his state post-conviction application in Section IV.C., under the heading:

"Other Improper Argument." The Court stated in that section:

> Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied.

Weaver, 912 S.W.2d 499, 514 (Mo. 1995).

Our court's en banc decision in Brown v. Luebbers, 371 F.3d 458, 462 (8th Cir. 2004) held that "the 'summary nature' of the discussion of the federal constitutional question does not preclude application of the AEDPA standard." The opinion goes on to cite to James v Bowersox, 187 F.3d 866, 869 (8th Cir. 1999). In James, our court stated that "[t]he summary nature of the Missouri Court of Appeals opinion does not affect [our decision to apply the AEDPA] standard." Id. at 869.

The Seventh Circuit ruled in Muth v. Frank, 412 F.3d 808, 815 (7th Cir. 2005) that:

> AEDPA's requirement that a petitioner's claim be adjudicated on the merits by a state court is not an entitlement to a well-articulated or even a correct decision by a state court. In fact, several circuits have held that a state court need not offer *any* reasons and summarily dispose of a petitioner's claim and that summary disposition would be an adjudication on the merits. (emphasis in original)

The Missouri Supreme Court's summary disposition of Section IV.C. claims is an adjudication on the merits. We understand the concurrence's argument that the Missouri Supreme Court discussed, in a cursory fashion, some of the specific claims set out in Section IV.C., but did not specifically address the war on drugs claim. However, a decision by a state supreme court that disposes of a claim, even in a conclusory fashion, is sufficient. In this case, the Missouri Supreme Court recognized a number of claims relating to allegedly improper closing arguments and summarily denied those claims. The discussion in Section IV.C., of the Missouri Supreme Court decision, read in context with the discussions in Section IV.A. and IV.B. is sufficient under our court's interpretation of AEDPA.

IV.

Under AEDPA, a court should only grant relief if "a decision [is] contrary to, or involves an unreasonable application of, clearly established Federal law" or "a decision [is] based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. §2254(d)(1)-(2); see also Williams v. Taylor, 529 U.S. 362 (2000).

The State argues that the United States Supreme Court has not addressed improper penalty-phase closing arguments by a prosecutor. However, we have previously found that argument unpersuasive. Copeland v. Washington, 232 F.3d 969, 974 (8th Circ. 2000) (noting that "it is apparent that there are Supreme Court decisions on penalty phase closing argument" and "[t]here are also Supreme Court decisions on guilt phase closing argument that are relevant").

The prosecutor's argument violates due process if it "infect[s] the trial with unfairness." Darden 477 U.S. at 181. To determine if a prosecutor's statement infected Weaver's trial with unfairness, the court must:

> (1) Measure the type of prejudice that arose from the argument; (2) examine what defense counsel did in his [or her] argument to minimize prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine if there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all the aggravating and mitigating circumstances.

Antwine v. Delo, 54 F.3d 1357, 1363 (8th Cir. 1995) (citing Newlon v. Armontrout, 885 F.2d 1328, 1337 n.10 (8th Cir. 1989)). The court should only grant habeas corpus relief it the state's "closing argument was so inflammatory and so outrageous that any reasonable trial judge would have sua sponte declared a mistrial." James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999). Without applying AEDPA, we vacated two sentences including that of Shurn, the man who hired Weaver to kill Taylor, when the prosecutor in Weaver's trial made similar improper arguments in the penalty phase. Newlon, 885 F.2d at 1329; Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999).

The prosecutor in this case made various penalty phase statements listed in detail in Section I. These statements can be categorized into several types: (1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the "war on drugs"; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should "kill [Weaver] now").

Category (1) is factually unique, but contains statements similar in nature to impermissible statements made in other cases. When a prosecutor tells a jury that they have a duty to kill and, as in this case, uses a graphic story from a movie to support that duty, the statement should be taken as "calculated to remove reason and responsibility from the sentencing process." Newlon, 885 F.2d at 1338. Soldiers have no choice but to kill. Soldiers follow orders when they kill. The responsibility for a particular death lies, therefore, with a commanding officer or the declaration of war itself, and not with a soldier's individual conscience. Furthermore, wartime killing is not a deliberative process, not a considered choice.

Describing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment. See Zan v. Stephens, 462 U.S. 862, 879 (1983). Not only was the main thrust of the prosecutor's argument diametrically opposed to the requirement that capital sentencing be at the jury's discretion, it also "diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment under Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985)." Antwine, 54 F.3d at 1361.

Categories (2), (4), and (5) are improperly inflammatory under several existing United States Supreme Court precedents. Statements about the prosecutor's personal belief in the death penalty are inappropriate and contrary to a reasoned opinion by the jury. Miller v. Lockhart, 65 F.3d 676, 684-86 (8th Cir. 1995). A prosecutor should not emphasize his or her position of authority in making death penalty determinations because it may encourage the jury to defer to the prosecutor's judgment. Newlon, 885 F.2d at 1335-37. Further, arguments against a rational decision by the jury, and specifically those that implore the jury to kill the defendant immediately, are contrary to a fair proceeding. Id. at 1336-37; see also Shurn, 177 F.3d at 667-69 (Wollman, J., concurring).

Category (3) is also factually distinct, but similar to arguments that are improper under existing law. The controlling Supreme Court precedent is well-settled and longstanding: the Eighth Amendment requires capital sentencing to be an individualized decision-making process. See, e.g., Jones v. United States, 527 U.S. 373, 381 (1999) ("In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry."); Buchanan v. Angelone, 522 U.S. 269, 274-74 (1998) (referring to "the Eighth Amendment requirement of individualized sentencing in capital cases"); Romano v. Oklahoma, 512 U.S. 1, 7 (1994) ("States must ensure that 'capital sentencing decisions rest on [an] individualized inquiry,' under which the 'character and record of the individual offender and the circumstances of the particular offense' are considered.") (quoting McCleskey v. Kemp, 481 U.S. 279, 303 (1987)); Harmelin v. Michigan, 501 U.S. 957, 995 (1991) ("We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is

'appropriate[.]'") (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976)); Zant, 462 U.S. at 879 ("What is important [from a constitutional standpoint] at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.").

The argument that a signal must be sent from one case to affect other cases puts a improper burden on the defendant because it prevents an individual determination of the appropriateness of capital punishment. Sublett v. Dormire, 217 F.3d 598, 600-01 (8th Cir. 2000). Further, invoking a jury's general fear of crime to encourage the application of the death penalty in a particular case is unfairly inflammatory. Copeland 232. F.3d at 972-73. Using the conscience of the community as a guiding principle for punishment puts too significant of a burden on a single defendant. United States v. Johnson, 968 F.2d 768, 770-71 (8th Cir. 1992).

There is little doubt that the prosecutor's statements are such that we would certainly grant relief without applying AEDPA. However, case law that applies the AEDPA bar makes it a closer decision. The question for us is whether the state court made an unreasonable interpretation of federal law as required by AEDPA. The finding by our court in Copeland is illustrative on this point. In Copeland, applying AEDPA, we found that the prosecutor's arguments in the penalty phase risked creating a mob mentality by preying on the jury's fear of crime. Copeland, 232 F.3d at 975. Further, the court found that, "it was unreasonable, in light of Supreme Court precedent, to conclude that the argument did not result in a deprivation of due process." The statements in this case are more egregious and systemic than those in Copeland.

The conclusion by the Missouri Supreme Court that "the penalty phase arguments . . . [were] reasonable" is unreasonable under existing United States Supreme Court precedents. It is

unclear which precedents the Missouri Supreme Court applied. Regardless, there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents. As a result, AEDPA does not bar relief in the present matter.

V.

For the foregoing reasons, we affirm the judgment of the district court.

BYE, Circuit Judge, concurring in the result.

I agree Weaver's claims warrant habeas relief even if AEDPA's strict standard of review applies. I write separately because I do not believe AEDPA applies.

When a claim raised in state court proceedings is ignored by the state courts "we apply a pre-AEDPA standard of review." Clemons v. Luebbers, 381 F.3d 744, 756 n.8 (8th Cir. 2004) (citing Taylor v. Bowersox, 329 F.3d 963, 967-68 (8th Cir. 2003)); see also Wiggins v. Smith, 539 U.S. 510, 534 (2003) ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis."); Canaan v. McBride, 395 F.3d 376, 382 (7th Cir. 2005) ("When a state court is silent with respect to a habeas corpus petitioner's claim, that claim has not been 'adjudicated on the merits' for purposes of §2254(d) [and] a federal court cannot apply the deferential standard provided by 2254(d)."); Maples v. Stegall, 340 F.3d 433, 436 (6th Cir. 2003) ("Where, as here, the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply.").

A careful side-by side examination of the claims Weaver

made in state court and the Missouri Supreme Court's opinion addressing those claims convinces me the latter ignored what Weaver referred to then as his "War On Drugs" argument, and what the Court refers to now as categories (3) and (5) of Weaver's claim, that is, the "War On Drugs" argument as well as the statements designed to appeal to the emotions of the jury.

Before the Missouri Supreme Court, Weaver made six separate arguments in a section entitled "Other Improper Arguments." The six separate arguments were as follows: 1) the prosecutor's statement that if Weaver had not run out of bullets, he would have shot a police officer; 2) the prosecutor's statement that if Weaver had not run out of bullets, he would have shot witness Jean Hanson; 3) the prosecutor's discussion of the death penalty as a deterrent to homicide in violation of a pre-trial motion in limine;[2] 4) the prosecutor's opinion there were crimes other than first degree murder for which a sentence of life without parole would be appropriate; 5) the prosecutor's claim he could have presented victim impact evidence through the victim's wife, relatives, and friends; and 6) the "War On Drugs" argument, which identified and challenged the specific portions of the sentencing transcript containing the prosecutor's

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[2]Specifically, the prosecutor argued:

> The death penalty deters. I'm convinced of that. People can argue for a thousand years whether it does or not, but I'm convinced it does. It doesn't deter passion killings. It doesn't deter crazed people who kill. But it deters business killings like this.

I set fort the specifics of this argument for the purpose of showing Weaver's "deterrent" claim was district from his "war-on-drugs" claim in state court.

statements that have been referred to as Claim 2M in the proceedings before our court.

The Missouri Supreme Court's opinion discusses only the first three of the six arguments advanced by Weaver.

> Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that [1] had Weaver not run out of bullets he would have shot the arresting officer. [2] He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. [3] Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied.

State v. Weaver, 912 S.W.2d 499, 514 (Mo. 1995).

In determining whether a claim has been "adjudicated on the merits" for the purpose of applying AEDPA's strict standard of review under 28 U.S.C. §2254(d), "[w]e must simply look at what a state court has said, case by case, and determine whether the federal constitutional claim was

considered and rejected by that court." Brown v. Luebbers, 371 F.3d 458, 461 (8th Cir. 2004). While I acknowledge the "summary nature of a state court's decision does not affect the applicable standard of review," Closs v. Weber, 238 F.3d 1018, 1020 (8th Cir. 2001) (citing James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999)), I submit a distinction must be drawn between summarily disposing of a claim and wholly ignoring it.

Significantly, when I look at what the state court said in this case, it is clear the state court discusses and analyzes only three of the six arguments advanced by Weaver in his "Other Improper Arguments" section. Most notably, the state court identified the third of Weaver's six arguments as his *final* argument, and nowhere discusses or analyzes Weaver's last three arguments, including his "War On Drugs" claim. I do not know what else to glean from what the state court said other than to conclude it ignored Weaver's most compelling constitutional claim.

As the Court notes, the Eighth Amendment requires capital sentencing to be an individualized decision-making process. See ante at 12. Not once, not twice, not thrice, but *seven* times the prosecutor urged the jury to ignore the individual offender, William Weaver. Instead of focusing the jurors' attention upon Weaver's character and record, and the particular circumstances of Weaver's offense, the prosecutor instead advised the jury "[t]he one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver." He told the jury "drug dealers . . . are taking our streets away from us." He advised the jury to "send a message" to "all dope peddlers and murderers in the world [for the sake of] all of us, the community. They are our streets, our neighborhoods, our family." He said drug dealers were 'society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's not deterrence. Then the whole system

fails and then chaos reigns and our streets are never safe. The dope peddlers reign."

These statements, as well as the other improper statements discussed by the Court, clearly violated Weaver's constitutional rights. I have no trouble concluding such to be the case when reviewing the district court's decision de novo or when applying the more demanding standard of review under AEDPA. I therefore concur in affirming the judgment of the district court.

BOWMAN, Circuit Judge, concurring in part and dissenting in part.

I agree with Judge Melloy that all of Weaver's claims are subject to review under the AEDPA standard and concur in Part III of his opinion. But because I do not think that the Court correctly applies that standard to Weaver's claims of prosecutorial misconduct, I respectfully dissent. Under 28 U.S.C. §2254(d)(1), as amended by AEDPA, we must accept a state court's decision on the merits of a claim later raised in federal habeas proceedings unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Court today, purporting to apply the AEDPA standard, holds that habeas relief must be granted to Weaver on his sentence.

The Court notes that several of Weaver's claims are "factually unique" or "factually distinct," presumably when compared to habeas claims adjudicated by the Supreme Court to date. ante at 10, 11. These factual distinctions alone raise red flags. I propose that it is less likely that a state court's decision will be contrary to or an unreasonable application of clearly established federal law when there are no Supreme Court cases on all fours. Moreover, the law that the Court cites

today as on point is found in opinions from this Circuit, not in opinions from the Supreme Court. "[A]s the statutory language makes clear, . . . §2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." Williams v. Taylor, 529 U.S. 362, 412 (2000).

The Supreme Court cases to which the Court does refer in its opinion stand for general propositions: "[a] prosecutor's argument violates due process if it 'infect[s] the trial with unfairness,'" ante at 9 (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)); the Eighth Amendment requires that a jury not be precluded from exercising its discretion, ante at 11 (citing Zant v. Stephens, 462 U.S. 862, 879 (1983) (noting the requirement in capital cases for an "*individualized* determination" of those defendants who should receive the ultimate penalty "on the basis of the character of the individual and the circumstances of the crime")); and there is a need for "an individualized decision-making process" so that a death sentence will pass constitutional muster, ante at 11 (citing Supreme Court cases at 11-12). None of the Supreme Court cases cited in the Court's opinion touches on the distinct claims of prosecutorial misconduct on which the writ was granted.

In these circumstances, I cannot agree that the Missouri Supreme Court's decision on the issue of the prosecutor's penalty-phase argument is contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. Were it not for the AEDPA standard of review, I might agree with the result reached by the Court today. Indeed, the outcome was different - where we did not apply the AEDPA standard - in our §2254 review of Weaver's co-defendant's death sentence on grounds of improper prosecutorial closing argument in the penalty phase. Shurn v. Delo, 177 F.3d 662, 665-67 (8th Cir.), cert. denied, 528 U.S. 1010 (1999); see also Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) (affirming pre-AEDPA grant of the writ on

grounds of improper prosecutorial argument), cert. denied, 497 U.S. 1038 (1990). But under AEDPA, we are not empowered to grant the writ even though we may believe that the state court got it wrong. A state-court decision is not necessarily unreasonable because the federal habeas courts deem it to be incorrect. Williams v. Taylor, 529 U.S. at 411. "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." Mitchell v. Esparza, 540 U.S. 12, 17 (2003) (expounding the "contrary to" standard). The only issue for the federal courts in this case is whether the state court's decision was contrary to or an unreasonable application of clearly established federal law. Because of the apparent inconclusive state of Supreme Court jurisprudence on the alleged constitutional violation in this case (the Court cites no apposite Supreme Court cases), I would hold that the state court's decision was neither contrary to nor an objectively unreasonable application of federal law and would reverse the judgment of the District Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:96-CV-2220 CAS
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Petitioner's First Amended Petition for Writ of Habeas Corpus filed on June 27, 1997. Respondent filed a response on September 8, 1997, and a supplemental response on September 11, 1997. Petitioner filed a traverse on January 5, 1998.

I. Procedural History.

On July 19, 1988, petitioner William Weaver was convicted of first-degree murder in the death of Charles Taylor by a jury in St. Louis County, Missouri. The next day, the jury sentenced Weaver to death.

Petitioner timely filed a pro se Motion to Vacate, Set Aside or Correct a Judgment of Guilty and of a Sentence of Death, pursuant to Missouri Supreme Court Rule 29.15 motion. Appointed counsel for petitioner timely filed an amended motion which incorporated the pro se motion and asserted additional points for relief. The state court conducted an

evidentiary hearing on petitioner's 29.15 motion on September 13-15, 1993, with a subsequent hearing on July 28, 1994. The postconviction motion court denied relief on all grounds on November 29, 1994.

Weaver appealed his conviction and sentence to the Missouri Supreme Court. Weaver's direct appeal was consolidated with his appeal from the denial of his postconviction motions. On December 19, 1995, the Missouri Supreme Court affirmed the conviction and death sentence. See State v. Weaver, 912 S.W.2d 499 (Mo. 1995) (en banc).

On April 18, 1996, Weaver filed a pro se habeas petition in federal district court. At that time, he had not yet petitioned the United States Supreme Court for review of the Missouri Supreme Court's decision affirming his conviction and death sentence. This Court dismissed his petition without prejudice to permit Weaver to fully exhaust his state remedies. Weaver petitioned the Supreme Court for a writ of certiorari, which was denied on October 7, 1996. Weaver v. Missouri, 519 U.S. 856 (1996).

On November 12, 1996, Weaver filed a second pro se habeas petition in the instant case. The Court appointed counsel to assist Weaver, and Weaver filed the instant First Amended Petition. This Court issued a Memorandum and Order on August 9, 1999, which granted petitioner a writ of habeas corpus on his Batson claim, the first claim presented in the First Amended Petition. The Eighth Circuit Court of Appeals reversed by opinion dated February 23, 2001, and directed this Court to address the remaining claims in petitioner's petition. See Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001).

II. Legal Standard.

In the earlier appeal of this matter, the Eighth Circuit

held that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to the instant petition for writ of habeas corpus, because it was filed after the effective date of the AEDPA.[3] Weaver, 241 F.3d at 1029. Title I of the AEDPA significantly amends habeas corpus law. The amended version sets forth a more stringent standard for issuance of a writ of habeas corpus, and substantially limits the power of a federal court to grant a state prisoner's habeas petition on grounds decided on the merits in state court. Carter v. Kemna, 255 F.3d 589, 591 (8th Cir. 2001) (citing Williams v. Taylor, 529 U.S. 362, 412-13 (2000)), cert. denied, 534 U.S.1085 (2002).

The text of section 2254(d) establishes the state court's decision as the starting point in habeas review. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 885 (3rd Cir.), cert. denied sub nom Matteo v. Brennan, 528 U.S. 824 (1999). Under the AEDPA's standards of limited and deferential review, "Federal courts may grant habeas relief to a state prisoner on a claim only if the state court's rejection of the claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' id. § 2254(d)(2). See Lomholt v. State of Iowa, __ F.3d __, 2003 WL 1961035, *2, No. 02-2236 (8th Cir. Apr. 29, 2003) (slip op. at 4).

A state court's decision is contrary to clearly established

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[3]Petitioner's assertions that the AEDPA does not apply to his case, and that this Court erred in dismissing his original petition for writ of habeas corpus on July 1, 1996, are moot. See First Amended Petition for Writ of Habeas Corpus, Claim Twenty-Two, p. 41.

Supreme Court precedent when it is opposite to the Supreme Court's conclusion on a question of law or different than the Supreme Court's conclusion on a set of materially indistinguishable facts. Williams, 529 U.S. at 412-13. A state court decision involves an unreasonable application of Supreme Court precedent if it correctly identifies the governing legal rules but unreasonably applies them to the facts of a prisoner's case. Id. at 407; Linehan v. Milczark, 315 F.3d 920, 924 (8th Cir. 2003). The Eighth Circuit has instructed, "As for an 'unreasonable application' of the law, we must remember that unreasonable is not the same as incorrect. Penry v. Johnson, 121 S. Ct. 1910, 1918 (2001). The state court's application might be erroneous, in our 'independent judgment,' yet not 'unreasonable.' Williams, 529 U.S. at 411." Kinder v. Bowersox, 272 F.3d 532, 538 (8th Cir. 2001).

"The factual findings of the state court also may be challenged in a § 2254 petition, but they are subject to an even more deferential review. Relief may be granted if the state court adjudication 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)(2). Factual findings by the state court 'shall be presumed to be correct,' a presumption that will be rebutted only by 'clear and convincing evidence.' Id. § 2254(e)(1)." Kinder, 272 F.3d at 538 .

III. Procedural Default.

"Federal habeas review is barred when a federal claim has not been 'fairly presented' to the state court for a determination on the merits." Hall v. Delo, 41 F.3d 1248, 1249 (8th Cir. 1994) (quoting Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994) (other internal citations omitted)). Even if a federal claim has been "fairly presented" to the state court, a federal court generally will decline to consider the claim if the state

court denied it on "independent and adequate state procedural grounds." Coleman v. Thompson, 501 U.S. 722, 729-30 (1991); see also Sloan v. Delo, 54 F.3d 1371, 1378 (8th Cir. 1995) ("If a state court finds that a defendant defaulted a claim under a state procedural rule, . . . federal courts generally will not consider it on habeas review."), cert. denied, 516 U.S. 1056 (1996). "To bar consideration of a defaulted claim on federal habeas review, the state's procedural rule must have been 'firmly established and regularly followed' when it was applied to the petitioner." Sloan, 54 F.3d at 1380 (quoting Ford v. Georgia, 498 U.S. 411, 421-25 (1991)).

"Missouri procedure requires that a claim be presented 'at each step of the judicial process' in order to avoid default." Jolly v. Gammon, 28 F.3d 51, 53 (8th Cir. 1994), cert. denied, 513 U.S. 983 (1994) (quoting Benson v. State, 611 S.W.2d 538, 541 (Mo. Ct. App. W.D. 1980)). Claims that are not raised on direct appeal or in postconviction Rule 29.15 proceedings or the appeal thereof generally are barred. See LaRette v. Delo, 44 F.3d 681 (8th Cir.) (citing Kennedy v. Delo, 959 F.2d 112, 115-16 (8th Cir.), cert. denied, 506 U.S. 857 (1992) (claims first raised in motion to recall the mandate are barred), and Byrd v. Delo, 942 F.2d 1226, 1231-32 (8th Cir. 1991) (claims first raised in state habeas petition are barred)), cert. denied sub nom LaRette v. Bowersox, 516 U.S. 894 (1995).

A Missouri court may "lift" the bar on an otherwise procedurally defaulted claim by reviewing the claim on the merits. Jolly, 28 F.3d at 53-54; Byrd, 942 F.2d at 1230. See also Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("State procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal review that otherwise might have been available.")

Absent a decision by a state court to lift the bar on an otherwise procedurally defaulted claim, a federal court will not consider the claim unless the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). "Objective factors that constitute cause include 'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" McCleskey v. Zant, 499 U.S. 467, 494 (1991) (quoting Murray, 477 U.S. at 488 (internal citations omitted)).

IV. Statement of Facts.

The Court offers the following statement of facts, adopted in its entirety from the opinion of the Missouri Supreme Court, solely for informational purposes:

> Prior to July 1987, Charles Taylor and members of Daryl Shurn's family had been involved in the ownership and operation of drug houses. A federal drug prosecution had been commenced against Daryl Shurn's brothers, Charles and Larry Shurn, in which Taylor was to be a key witness. Taylor had worked for the Shurns and held some of the Shurns' drug houses in his name.
>
> On the morning of July 6, 1987, William Weaver and Daryl Shurn arrived at Taylor's

home in the Mansion Hills apartment complex. Their plan was to force Taylor to sign over the Shurns' drug properties which Taylor was retaining in his name against the Shurns' will. After Taylor had signed the paperwork, Weaver was supposed to kill Taylor. The plan was not completely successful.

After Weaver and Shurn entered Taylor's apartment, Taylor unexpectedly pulled a gun and escaped. Weaver and Shurn gave chase and fired several shots at Taylor. Numerous residents saw Weaver and Shurn running after Taylor, shooting at him. Weaver and Shurn followed Taylor to a wooded area where Taylor fell from his wounds. Weaver and Shurn went back to the automobile. Then Weaver returned to the wooded area where Taylor had fallen and shot Taylor again. Taylor died from several gunshot wounds to the head.

Weaver and Shurn drove away from the murder scene at a high rate of speed. Witnesses at the scene immediately reported the incident to police, giving a detailed description of the vehicle. Shortly thereafter, police spotted the Shurn vehicle and gave chase. Following a collision during rush hour traffic on Interstate 70, Weaver and Shurn fled on foot. Shurn was captured at the scene, but Weaver ran off toward the Hillcrest Apartment complex adjacent to the highway. Not far away, another police officer located Weaver running shoeless on a concrete street, sweating profusely. On approach by the officer, Weaver claimed he was jogging, although he was many miles from home. He

> claimed to be lost. Weaver was placed under arrest and returned to the scene of the accident where one of the original pursuing police officers positively identified Weaver as the man who ran away from the Shurn car after the crash.
>
> While awaiting trial, Weaver was incarcerated with a man by the name of Robert Dutch Tabler. Tabler testified that Weaver told him he was a hit man on the streets, that defendant and Shurn had killed Charles Taylor, and that defendant's testimony at trial would be that he was merely out jogging when the police stopped him. Weaver's primary defense at trial was misidentification by police.

State v. Weaver, 912 S.W.2d at 507-08.

V. Discussion.

A. Claim Two: Improper Arguments by Prosecutor.[4]

In his second claim for relief (Claims 2.B. through 2.M.), petitioner asserts that the prosecuting attorney made improper statements in his guilt and penalty phase closing arguments, which violated petitioner's right to due process on the issue of punishment. Petitioner contends that the prosecutor's improper statements violated his rights under the Sixth, Eighth and Fourteenth Amendments. Petitioner asserts that twelve separate statements were improper as either

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[4]As previously stated, petitioner's first claim, the Batson claim, was addressed in the Memorandum and Order of August 9, 1999, and the subsequent appeal.

injecting the prosecutor's personal beliefs, threatening the jury, appealing to jurors' fears and emotions, arguing irrelevant and immaterial issues, or arguing that defense counsel had tried to create "smokescreens," knowingly fabricated petitioner's defense, and had been involved in obtaining perjured testimony. The subpoints of Claim Two are set forth and labeled in the same manner as in the First Amended Petition:

> B. As part of the initial guilt phase closing argument, the prosecutor said, "He's guilty as charged and I think the evidence has proved it and I think he's guilty of murder in the first degree (Tr. 1645). . . . But it's murder first degree or it's nothing." . . .
>
> "[I]n my opinion, the only reason we've been here is because the guilt is obvious. Your decision in this case is trying to decide whether he should die or go free. The guilt is obvious." (Tr. 1647).
>
> C. During the guilt phase rebuttal argument the prosecutor said, "And, yet, I stand here afraid, afraid that because Doris Black is so good and because you people may get confused . . . If you do, then a hit man goes free." (Tr. 1713).
>
> "Come on. All these coincidences you can't believe. It's nonsense. If you don't believe the state's case here, you twelve people will never convict anybody." (Tr. 1710).
>
> "But in order for you to let him go, you've got to believe that all this perjury was involved, that I was part of it." (Tr. 1721).
>
> D. During the initial penalty phase argument, the prosecutor said, "Well if this isn't it, what would it

be? If this isn't a case where you can impose a death penalty, where people would go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it in? So if you were being honest to me when you said that, then that has to be the case." (Tr. 1761).

"If this isn't a case that calls for the death penalty, I can't imagine one that would. And, yet, you people all told me in a given case you could do it. Some of you even said you would prefer it, that you would favor it in the right case. This is the right case." (Tr. 1762).

"I mean if this isn't the case for the death penalty, then there's no case you'll do it." (Tr. 1765).

E. The prosecutor continued during the penalty phase rebuttal argument, "So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that, but that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty." (Tr. 1778).

F. During the penalty phase rebuttal argument, the prosecutor stated, "Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it? I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers.

And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do." (Tr. 1782-83).

G. The prosecutor also argued during the penalty phase rebuttal that a police officer and a witness would have been killed if facts were different: "William Weaver ran out of bullets. Think back to the evidence. I'm sure you discussed it yesterday. But when you discuss his fate, think about the evidence. He ran out of bullets and Charles Taylor was still alive. So when they go back, he's reloading. All six spent casings are on the floorboard right where he was and he's reloading while Daryl is driving and they stop and he goes back and shoots him some more. Then I'm going to tell you that he was out of bullets, because if he hadn't been, Officer Crain would have been dead because he would have kept the gun on him instead of pitching it out of the car."

H. After objection, the prosecutor continued, "If he had still had the gun and still had bullets, do you think he would have sure surrendered as meek as a lamb? I mean, of course, he wouldn't have surrendered. What if Jean Henson would have been jogging a little bit later than she was and coming around the woods or the clearing at the time of the murder and he still had some bullets. You think she would be alive?" (Tr. 1762-64).

I. During the guilt phase, the prosecutor argued, "And now, of course, Mr. Weaver is here lying to you and telling you he didn't do it and wanting you to believe that and hoping through the assistance of Ms. Black--who is just about as capable a defense attorney as you're going to find in these cases--that enough confusion, enough smokescreens, enough whatever has been created to put in your mind some reasonable doubt as to his guilt." (Tr. 1645).

J. Over objection, the prosecutor continued, "But as the case unraveled, I'm sitting there listening to all this and I've got my back to you people, and I don't know what impact the things elicited by Ms. Black may have had on you. I don't know whether you think these little mole hills that Ms. Black talked about are now mountains in your mind or if they are still mole hills. I don't know whether the smokescreen she's creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see it's nothing more than a smokescreen and you're waiting to get to the jury room to render a verdict of guilty.

"But at this point, you've heard all the evidence you're going to hear. But that's all you heard for four or five days was a harangue to try to create confusion out of nothing, to try to get a police officer to make one little mistake which then makes him a liar, one inconsistency, whatever, and they are liars; they are perjurers. Just create whatever smokescreen you have. So the last day or two, I've been concerned what impact this is having on the jury.

"Well last night when I'm trying to decide exactly what I'm going to say to you and I cleared all the smoke away and all the harangue and all the noise,

you're left with nothing more than the facts." (Tr. 1648-49).

K. The prosecutor stated, "And by the way, I'm not even convinced the girl was having an affair with him. I think they found a young girl and she may be willing to come in here and be the heroine this week. Ms. Black talked about her being so embarrassed, how difficult it was for her to testify. She came back the next day and sat in the first row and for three or four more days. She's the star of the show. She is the heroine." (Tr. 1665).

M. Finally, petitioner also objects to the prosecutor's argument during the penalty phase that the death sentence was appropriate due to petitioner's connection to the Shurn family and their drug operation (Tr. 1760, 1776, 1777), on the basis that there was no evidence petitioner had knowledge of the Shurn family's drug trade. Petitioner argues there are no facts in the record to support the argument that petitioner would have shot a police officer and a witness if he had not run out of bullets (Tr. 1762-64). Petitioner argues that the prosecutor's argument the death penalty is a deterrent (Tr. 1778-79), was without factual basis. Petitioner argues the prosecutor's "war on drugs" argument (Tr. 1759, 1768, 1776-77, 1779, 1781) was intended to appeal to the jury's passions and inflame them.

Petitioner presented the majority of these points to the Missouri Supreme Court, which resolved the issues as follows:

> Defendant argues that the state's closing arguments during both the guilt and penalty phases were erroneous and further that counsel

was ineffective in failing to object to some of the improper arguments. A review of the record discloses that defense counsel objected vehemently to almost all the arguments complained of here and that several of the objections were sustained, followed by curative instructions to the jury. The trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted. *State v. Armbruster*, 641 S.W.2d 763, 766 (Mo. 1982). Our review of the arguments discloses neither error in permitting the arguments nor ineffective assistance of counsel in failing to object.

A.

First, Weaver alleges that the prosecutor improperly emphasized his position as elected prosecutor in his choice of seeking the death penalty. The specific arguments were as follows:

(1) In the guilt phase, the prosecutor said, "If you don't believe the state's case here, you twelve people would never convict anybody." Defense counsel objected, and the court instructed the jury to disregard the comment.

(2) In the penalty phase closing, the prosecutor said, "Well, if this isn't [the proper case for the death penalty], what would it be? If this isn't a case where you can impose a death penalty, where people go out to Mr. Taylor's house to kill him because he's a witness, then what case

would you ever return it in? . . . If this isn't a case that calls for the death penalty, I can't imagine one that would." The court overruled defense counsel's objection to this argument.

(3) Continuing his penalty phase closing argument, the prosecutor said, "I mean, if this isn't the case for the death penalty, then there's no case you'll do it . . . and, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty . . . I'm the prosecuting attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." The trial court sustained the defendant's objection to the last statement and instructed the jury to disregard it.

(4) Finally, the prosecutor said, "If these facts don't justify, don't cry out for the death penalty, then which facts do?" To that statement, the trial court overruled the objection.

A prosecutor's argument may make reasonable inferences from the evidence. *Shurn*, 866 S.W.2d at 460; *State v. McDonald*, 661 S.W.2d 497, 506 (Mo. banc 1983), *cert. denied*, 471 U.S. 1009, 105 S. Ct. 1875, 85 L.Ed.2d 168 (1985). The inferences need not necessarily seem warranted. *Grubbs v. State*, 760 S.W.2d 115, 119 (Mo. banc 1988), *cert. denied*, 490 U.S. 1085, 109 S. Ct. 2111, 104 L.Ed.2d 672 (1989). Statements by a prosecuting attorney in argument indicating his or her opinion that the accused is guilty, where it is apparent that such opinion is based on the evidence in the case, is

permissible. *State v. Moore*, 428 S.W.2d 563, 565 (Mo. 1968); *State v. Paglino*, 319 S.W.2d 613, 625 (Mo. 1958). In this case, the prosecutor's rhetorical questions may seem flamboyant, if not somewhat abrasive, to a juror's ears. However, given the eyewitness testimony of how the murder was carried out and the cold execution manner in which the victim was killed, it is fair for the prosecutor to point out the strength of the state's case. The use of the rhetorical questions was, for the most part, a fair comment on the strength of the case.

As for his statements regarding his position as prosecuting attorney of the county, the court properly sustained the objections and directed the jury to disregard the argument. Trial courts have a superior vantage point from which to assess the pervasive effect of an improper argument. Thus, whether it can be dissipated by timely and appropriate action short of declaring a mistrial is a matter within the sound discretion of the trial court. *State v. Carter*, 641 S.W.2d 54, 60 (Mo. banc 1982), *cert. denied*, 461 U.S. 932, 103 S. Ct. 2096, 77 L.Ed.2d 305 (1983).

This case is distinguishable from cases relied on by the defendant, including *State v. Evans*, 820 S.W.2d 545 (Mo.App. 1991). There the prosecutor said, "If [the defendant] were innocent, I wouldn't bring a charge." *Id.* at 547. Merely stating that the prosecutor determines which penalty to ask for in capital cases is not the same as saying that if the defendant were innocent, he would not be charged. The objection, followed by the curative instruction,

is adequate here.

In addition, this case is distinguishable from *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989). There the court found that because the prosecutor expressed his personal belief in the propriety of the death penalty, emphasized his position of authority in the county as prosecutor, attempted to associate the defendant with several well-known mass murderers, appealed to the jurors' personal fears and emotions, and asked the jurors to "kill" the defendant, under the totality of the circumstances rendered the penalty phase of the trial fundamentally unfair. 885 F.2d at 1336-37. The arguments here do not rise to the level of the egregious conduct that is reported in *Newlon*. Neither is this case comparable with *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), where this Court reversed the punishment in a capital case because the prosecutor, among other excesses, had compared the brutality of the murder as being worse than all other murders in the county. Here there was no abuse of discretion in the trial court's ruling on defense counsel's objections.

B.

In his closing remarks, the prosecutor called the defendant's misidentification defense a "cock and bull story" and a "smokescreen," referred to the defendant as a liar, said defense counsel was "bold" and called in question the credibility and motives of several defense witnesses. Weaver characterizes the state's closing arguments as portraying defense counsel as having suborned

perjury. Comments to the effect that a defendant or a defense witness were lying have repeatedly been upheld. A prosecuting attorney may comment on the evidence and the credibility of [a] witness and, in the process, may belittle and point to the improbability and untruthfulness of specific testimony. *State v. Johnson*, 496 S.W.2d 852, 859 (Mo. 1973). Here the comments on the testimony of the witnesses were well within the range of the prosecutor's adversarial responsibilities in making closing argument.

Directly arguing that defense counsel has suborned perjury or fabricated evidence has been held to be prejudicial error. *State v. Burnfin*, 771 S.W.2d 908, 912-13 (Mo.App. 1989); *State v. Harris*, 662 S.W.2d 276, 277 (Mo.App. 1983). However, the prosecutor here did not go that far when he said:

> I don't know whether the smokescreen [defense counsel is] creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see, it's nothing more than a smokescreen . . . .
>
> [Defense counsel has] got the nerve to show you these photographs that she said look like they were taken at nighttime. I guess you just have to believe with somebody that bold that she is going to suggest

> that was taken at night time as opposed to bad exposure, if you want to buy that boldness.

To suggest that the arguments advanced by defense counsel are "smokescreens" or "bold" fall far short of accusing counsel of suborning perjury or the other egregious accusations against defense counsel that occurred in *Burnfin, Harris*, or other cases relied on by the defendant. At most, the comments by the prosecuting attorney were near error which, by definition, is not error. The point is denied.

C.

Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial

> court abused its discretion in permitting the argument is without merit. The point is denied.

See Respondent's Ex. G, pp. 14-16; Weaver, 912 S.W.2d at 512-14.

The Court begins with the opinion of the Missouri Supreme Court. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(2). See Linehan, 315 F.3d at 924.

Federal law regarding prosecutorial overreaching in closing arguments is clearly established. The Supreme Court has ruled it is not enough that a prosecutor's comments were undesirable or even universally condemned. In order to be a constitutional violation, a statement by a prosecutor in closing argument of the guilt phase must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). The Eighth Circuit has stated with respect to improper penalty phase argument, "it would seem that there should be a more searching review of the penalty phase as the Eighth Amendment is implicated." Copeland v. Washington, 232 F.3d 969, 974 n.2 (8th Cir. 2000) (applying AEDPA standard, vacating death sentence based on improper argument by prosecutor during penalty phase), cert. denied, 532 U.S. 1024 (2001). The Court in Copeland noted that the Eighth Circuit has vacated a death sentence based on improper closing argument during the penalty phase in three other recent cases. See Shurn v. Delo, 177 F.3d 662 (8th Cir.), cert. denied sub nom Shurn v.

Bowersox, 528 U.S. 1010 (1999); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995), cert. denied sub nom Bowersox v. Antwine, 516 U.S. 1067 (1996); Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied sub nom Delo v. Newlon, 497 U.S. 1038 (1990).

This Court will discuss separately the challenged arguments in the guilt and penalty phases. The Court will also consider the cumulative effect of the challenged arguments. United States v. Young, 470 U.S. 1, 11-12 (1985) (to decide the effect of a prosecutor's remarks, a court examines the totality of the circumstances and the remarks within the context of the trial).

1. Guilt Phase.

Petitioner objects to a number of separate statements by the prosecutor during the guilt phase closing argument and rebuttal argument.

a. Claims 2.B. and 2.C.: Prosecutor's Personal Beliefs; Threats to Jury.

Petitioner argues that the prosecutor subjected the jurors to improper argument by means of six statements which asserted his personal beliefs and threatened the jury. The statements at issue made during the initial closing argument are:

> "He's guilty as charged and I think the evidence has proved it and I think he's guilty of murder in the first degree (Tr. 1644-45). . . . But it's murder first degree or it's nothing." . . . (Tr. 1645).
>
> "[I]n my opinion, the only reason we're here [is] because the guilt is obvious. Your decision in

> this case is trying to decide whether he should die or go free. The guilt is obvious." (Tr. 1647).

Defense counsel objected to the second remark on the basis that "the case is being tried to first determine guilt or innocence." (Tr. 1647). The trial court overruled the objection. (Id.) Later, the prosecutor stated:

> But you have the option of saying not guilty. It will be the biggest mistake of your life, but you have that option. (Tr. 1665).

The statements at issue made during the rebuttal closing argument are:

> "Come on. All these coincidences you can't believe. It's nonsense. If you don't believe the state's case here, you twelve people will never convict anybody." (Tr. 1710).

Defense counsel objected to this argument on the grounds that it was "totally improper to give that kind of threat to the jury." (Tr. 1710). The trial court sustained the objection, and on defense counsel's request struck the comment and instructed the jury to disregard it. (Id.) The prosecutor also stated:

> "And, yet, I stand here afraid, afraid that because Doris Black is so good and because you people may get confused . . . If you do, then a hit man goes free." (Tr. 1713).

Defense counsel objected to this argument on the grounds that it was a threat to the jury, contrary to the trial court's instructions, and was "just to elicit shock." (Tr. 1713). The trial court overruled the objection. (Tr. 1714). Finally, the

prosecutor stated:

> "But in order for you to let him go, you've got to believe that all this perjury was involved, that I was part of it--" (Tr. 1721).

Defense counsel objected on the grounds that this argument was improper, as the jury did not have to believe that the prosecutor was part of a conspiracy to commit perjury in order to acquit the petitioner. (Tr. 1721). The trial court overruled the objection. (Id.) Defense counsel then moved for a mistrial, which the trial court denied. (Tr. 1722).

None of these six statements by the prosecutor were presented to the Missouri Supreme Court. As a result, Claims 2.B. and 2.C. are procedurally defaulted and the Court's consideration of the claims is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15. Therefore, dismissal of Claims 2.B. and 2.C. is appropriate.

Moreover, if the Court were to reach the merits of the claims, it would conclude plaintiff is not entitled to relief. In Darden, the Supreme Court examined several factors in determining whether prosecutorial misconduct at trial was so egregious that it required a new trial as a matter of constitutional law: (1) whether the prosecutor's statement manipulated or misstated the evidence; (2) whether the remarks implicated specific rights of the accused such as the right to counsel or the right to remain silent; (3) whether the defense invited the response; (4) instructions given by the trial court; (5) the weight of the evidence against the defendant; and (6) the defendant's opportunity to rebut. Darden, 477 U.S. at 181-82.

The prosecutor's statements did not misstate the evidence or implicate specific rights of the petitioner. Some of the prosecutor's statements were in response to defense counsel's attacks on the State's evidence. The trial court sustained some of defense counsel's objections to the prosecutor's statements, and instructed the jury that arguments of counsel were not evidence in the case. (Instruction No. 19, L.F. at 133.) There was significant evidence against petitioner, including the eyewitness testimony of several witnesses, albeit only with respect to his general build and clothing; testimony concerning petitioner's apprehension while running barefoot in Pasadena Hills far from his home, but not far from where Daryl Shurn's car was wrecked; testimony by Police Officer Gardiner that petitioner was the same person he saw run from Shurn's wrecked car; uncontroverted testimony that petitioner's car was parked in the Mansion Hills apartment parking lot; and testimony that petitioner's keys were found in Daryl Shurn's wrecked car after the accident. Assuming the prosecutor improperly injected his personal opinion into closing argument, petitioner has not shown that the improper argument rendered his trial fundamentally unfair. The Court cannot conclude that but for the prosecutor's improper remarks, the outcome of the guilt phase would have been different, or that the prosecutor's statements in closing argument of the guilt phase "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181.

b. Claims 2.I.- 2.L.: Attacks on Defense Counsel--Fabrication of Evidence.

In Claims 2.I., 2.J., 2.K. and 2.L., petitioner argues that the prosecutor violated his due process rights by arguing that defense counsel knowingly introduced perjured testimony and fabricated petitioner's defense, and by improperly injecting the prosecutor's personal belief that defense counsel was involved with obtaining perjured testimony:

And now; of course, Mr. Weaver is here lying to you and telling you that he didn't do it and wanting you to believe that and hoping through the assistance of Ms. Black -- who is just about as capable of a defense attorney as you're going to find in these cases -- that enough confusion, enough smokescreens, enough whatever has been created to put in your mind some reasonable doubt as to his guilt. (Tr. 1645).

. . . . .

But as the case unraveled, I'm sitting there listening to all this and I've got my back to you people, and I don't know what impact the things elicited by Ms. Black may have had on you. I don't know whether you think these little mole hills that Ms. Black talked about are now mountains in your mind or if they are still mole hills. I don't know whether the smokescreen she's creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see it's nothing more than a smokescreen and you're waiting to get to the jury room to render a verdict of guilty.

But at this point, you've heard all the evidence you're going to hear. But that's all you heard for four or five days was a harangue to try to create confusion out of nothing, to try to get a police officer to make one little mistake which then makes him a liar, one inconsistency, whatever, and they are liars; they are perjurers. Just create whatever smokescreen you have. So the last day or two, I've been concerned what impact this is having on the jury?

> Well, last night when I'm trying to decide exactly what I'm going to say to you and I cleared all the smoke away and all the harangue and all the noise, you're left with nothing more than the facts. (Tr. 1648-49).
>
> . . . . .
>
> And by the way, I'm not even convinced the girl was having an affair with him. I think they found a young girl and she may be willing to come in here and be the hero this week. Ms. Black talked about her being so embarrassed, how difficult it was for her to testify. She came back the next day and sat in the first row and for three or four more days. She's the star of the show. She is the heroin[e]. (Tr. 1665).

With respect to these statements, the Missouri Supreme Court observed that prosecutors' comments to the effect that a defendant or a defense witness were lying have repeatedly been upheld, and a prosecutor may comment on the evidence and the credibility of the witnesses. The state court found the prosecutor's remarks in this case to be well within the range of proper comment. The Missouri Supreme Court stated that direct arguments defense counsel has suborned perjury or fabricated evidence have been held to be prejudicial error, but concluded the prosecutor in this case did not go that far. The state court concluded the prosecutor's arguments that defense counsel had erected a "smokescreen" fell short of accusing counsel of suborning perjury, and at most were "near error, which by definition, is not error." Weaver, 912 S.W.2d at 513-14.

Prosecutors should refrain from personal attacks on defense counsel. United States v. O'Connell, 841 F.2d 1408, 1428 (8th Cir.), cert. denied, 488 U.S. 1011 (1988).

Nonetheless, "Prosecutorial misconduct does not warrant federal habeas relief unless the misconduct infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts v. Bowersox, 137 F.3d 1062, 1066 (8th Cir. 1988) (citing Darden, 477 U.S. at 181), cert. denied, 525 U.S. 1073 (1999). "Improper prosecutorial remarks violate due process when there is a reasonable probability the remarks affected the trial's outcome." Id. To decide the effect of a prosecutor's remarks, a court examines the totality of the circumstances and the remarks within the context of the trial. United States v. Young, 470 U.S. at 11-12. Comments similar to those made by the prosecutor in this case have been held not to warrant habeas relief or require a new trial. See, e.g., Roberts, 137 F.3d at 1066 (prosecutor's argument which questioned defense counsel's honesty several times and referred to the attorney's failure to present certain evidence, even if improper, did not violate due process); United States v. Finch, 16 F.3d 228, 232 (8th Cir. 1994) (direct appeal; government's argument that a witness was telling the truth and defense counsel was trying to mislead the jury were not impermissible).

Based on the foregoing authority, and after examining the totality of the circumstances including the weight of the evidence against petitioner, the Court concludes petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims 2.I., 2.J., 2.K. and 2.L.

2. Penalty Phase.

In Claims 2.D., 2.E., 2.F., 2.G., 2.H. and 2.M., petitioner objects to a number of statements by the prosecutor during the penalty phase closing argument and rebuttal argument as violating his due process rights under the Fourteenth Amendment and his rights under the Sixth and Eighth Amendments. Petitioner argues that the prosecutor's remarks impermissibly injected his personal opinions and beliefs, threatened the jury, and appealed to the jurors' fears and emotions. Petitioner also argues that the prosecutor improperly argued irrelevant and immaterial issues intended to inflame the jury, which were not based on the evidence.

In the Eighth Circuit, there is a well-established analysis for determining whether a prosecutor's improper closing argument during the penalty phase rises to the level of a due process violation. Miller v. Lockhart, 65 F.3d 676, 683 (8th Cir. 1995). A court should:

> (1) measure the type of prejudice that arose from the argument; (2) examine what defense counsel did in his argument to minimize the prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine if there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all of the aggravating and mitigating circumstances.

Antwine, 54 F.3d at 1363. As previously stated, the Eighth Circuit has observed "it would seem that there should be a more searching review of the penalty phase as the Eighth Amendment is implicated." Copeland, 232 F.3d at 974 n.2. The Eighth Circuit has vacated a death sentence based on improper closing argument during the penalty phase in four recent cases. See Copeland, 232 F.3d 969; Shurn, 177 F.3d 662 ; Antwine, 54

F.3d 1357; and Newlon, 885 F.2d 1328.[5]

a. Claim 2.D.

The challenged statements in Claim 2.D. began with the following:

> Well if this isn't it, what would it be? If this isn't a case where you can impose a death penalty, where people would go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it in? So if you were being honest to [sic] me when you said that, then that has to be the case. (Tr. 1761).

Defense counsel objected to the argument as improper, arguing that the prosecutor's statement was threatening to the jury and was intended to impose fear and intimidation on the jury in order to get it to return a verdict of death. Defense counsel asked the trial court to sustain her objection and instruct the jury

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[5]This Court notes that the prosecutor in the instant case, George "Buzz" Westfall, was also the prosecutor in the Shurn and Newlon cases. Mr. Westfall testified at the Rule 29.15 motion hearing that he tried three death penalty cases while he was the prosecuting attorney: Newlon, Shurn, and Weaver. Resp. Ex. D, Tr. on Appeal, Vol. 1, p. 115. The Eighth Circuit's decision in Newlon, which granted habeas corpus relief partly because Mr. Westfall's closing argument was found to violate due process, was issued approximately five weeks prior to the trial of the Weaver case. Mr. Westfall testified at the Rule 29.15 motion hearing that he was aware prior to the trial that Newlon had vacated Newlon's sentence of death in part because of his remarks in closing argument. Resp. Ex. D, pp. 154-55.

to disregard the statement, but the trial court refused. (Tr. 1762).

> The prosecutor continued:
> If this isn't a case that calls for the death penalty, I can't imagine one that would. And, yet, you people all told me in a given case you could do it. Some of you even said you would prefer it, that you would favor it in the right case. This is the right case. (Tr. 1762).

Subsequently, the prosecutor stated:

> I mean if this isn't the case for the death penalty, then there's no case you'll do it. (Tr. 1765).

With respect to these statements, the Missouri Supreme Court observed that a prosecutor's argument may make reasonable inferences from the evidence, even if the inferences do not necessarily seem warranted. Weaver, 912 S.W.2d at 512. The state court said a prosecuting attorney in argument may indicate his opinion that the accused is guilty, where it is apparent the opinion is based on the evidence in the case. Id. The state supreme court stated the prosecutor's statements in this case "may seem flamboyant, if not somewhat abrasive," but given the eyewitness testimony about how the murder was carried out, the court concluded it was fair for the prosecutor to point out the strength of the state's case. The court concluded that the prosecutor's use of rhetorical questions was, "for the most part, a fair comment on the strength of the case." Weaver, 912 S.W.2d at 513.

"An attorney's personal opinions are irrelevant to the . . . jury's task." Newlon v. Armontrout, 693 F. Supp. 799, 804 (W.D. Mo. 1988) (quoting Brooks v. Kemp, 762 F.2d 1383, 1408 (11th Cir. 1985) (en banc)), aff'd, 885 F.2d 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990). Here, the prosecutor

repeatedly offered his opinion that the death penalty was the only appropriate penalty, and that if the jurors had been honest with him in responding to voir dire questioning, the jury must return a verdict of death. This line of argument was improper because it was intended to intimidate the jury into returning a verdict of death. "Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required. This kind of abuse plays upon the jury's susceptibility to credit the prosecutor's viewpoint." Brooks, 762 F.2d at 1410.

"The prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." Brooks, 762 F.2d at 1399. As a result, a prosecutor's misconduct may be grounds for reversal in part because of a "systemic belief that a prosecutor, while an advocate, is also a public servant 'whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" Id. (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). In Berger, the United States Supreme Court stated it is as much a prosecutor's "duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. at 88. The Supreme Court discussed the tendency for the prosecutor to have an excessive influence on the jury:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge, are apt to carry much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

A review of the record shows that defense counsel chose to focus her penalty phase argument on the possibility that the jury had made an error in its guilt phase verdict; that if it were later determined an error had been made, it could be corrected if petitioner were in prison, but not if he had been executed; that the jurors could certainly consider the penalty of life in prison, even for this type of killing; that the jury should choose life because they might be mistaken, because of the mitigating circumstances that existed, including petitioner's children and ill mother, because of petitioner's conduct during incarceration, and because of the good things petitioner's friends had said about him; and that life in prison would be a terrible punishment, "like a living death," so that the jury would have "sent [its] message" and "done [its] job." Tr. on Appeal, Vol V., pp. 1769-76. Thus, defense counsel chose not to devote her argument to rebutting or challenging the prosecutor's statements to which she had earlier objected. According, defense counsel's argument did not serve to minimize any prejudice that arose from the prosecutor's statements. As previously stated, the trial court instructed the jury that statements of counsel are not evidence, and that they should be guided by the evidence.

Considering all of the evidence and the record as a whole, the Court cannot conclude that these improper prosecutorial remarks alone affected the trial's outcome, or "infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts, 137 F.3d at 1066 (citing Darden, 477 U.S. at 181). Thus, the Court concludes petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

b. Claims 2.G. and 2.H.

In Claims 2.G. and 2.H., petitioner challenges the following statements of the prosecutor as improperly arguing irrelevant and immaterial issues:

> William Weaver ran out of bullets. Think back to the evidence. I'm sure you discussed it yesterday. But when you discuss his fate, think about the evidence. He ran out of bullets and Charles Taylor was still alive. So when they go back, he's reloading. All six spent casings are on the floorboard right where he was and he's reloading while Daryl is driving and they stop and he goes back and shoots him some more. Then I'm going to tell you that he was out of bullets, because if he hadn't been, Officer Crain would have been dead because he would have kept the gun on him instead of pitching it out of the car. (Tr. 1762-63).

Defense counsel objected to this argument as irrelevant and prejudicial on the grounds that there was no evidence petitioner had threatened Officer Crain or that he had a gun when he saw Officer Crain. (Tr. 1763). The trial court overruled the objection and the prosecutor continued:

> If he had still had the gun and still had bullets, do you think he would have sure surrendered as meek as a lamb? I mean, of course, he wouldn't have surrendered. What if Jean Henson would have been jogging a little bit later than she was and coming around the woods or the clearing at the time of the murder and he still had some bullets. You think she would be alive? (Tr. 1763).

Defense counsel objected to this argument as improper on the grounds that it was intended to invoke sympathy and outrage from the jury, and that there was no evidence the person who killed Taylor ever tried to kill Jean Henson. The trial court overruled the objection. (Tr. 1763).

The Missouri Supreme Court concluded the prosecutor's argument that petitioner would have shot more people if he had not run out of bullets was reasonable as the evidence presented permitted an inference that petitioner "had a high propensity for violent conduct in the future." Weaver, 912 S.W.2d at 514.

This Court concludes these arguments are not a reasonable inference based on the evidence presented in the record. An argument that more people could have been killed could be made in any case where criminal violence has resulted in death. The arguments were intended to play on the jurors' emotions and inflame them. "When the sovereign takes the life of one of its citizens, it is vital that 'any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" Newlon, 693 F. Supp. at 806 (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

Nonetheless, considering all of the evidence and the record as a whole, the Court cannot conclude that these improper remarks alone affected the trial's outcome, or "infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts, 137 F.3d at 1066 (citing Darden, 477 U.S. at 181). Thus, the Court concludes petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

c. Claims 2.E. and 2.F.

In Claims 2.E. and 2.F., petitioner argues that the

prosecutor's statements impermissibly injected his personal beliefs and objections, threatened the jury, and appealed to jurors' fears and emotions:

> So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that, but that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty. (Tr. 1778).

Defense counsel objected to this argument as improper and as a misstatement of the law. The trial court sustained the objection and granted defense counsel's request to instruct the jury to disregard the statement. (Tr. 1778).

> Later, the prosecutor stated:
> Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But

> tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do. (Tr. 1782-83).

Defense counsel objected that the prosecutor's argument was improper and was intended to inflame and prejudice the jury. The trial court overruled the objection. (Tr. 1782-83).

Both of these arguments were presented to the Missouri Supreme Court, but that court did not discuss them specifically. The state court distinguished the prosecutor's remarks in this case from more egregious remarks in other cases which did render the trial fundamentally unfair, such as a prosecutor's comment that he would not bring a charge if the defendant were innocent, State v. Evans, 820 S.W.2d 545, 547 (Mo. App. E.D. 1991), or a prosecutor's comment that a murder was so brutal, it was worse than all other murders in the county, State v. Storey, 901 S.W.2d 886 (Mo. 1995) (en banc). The Missouri Supreme Court also distinguished this case from Newlon v. Armontrout, 885 F.2d 1328, on the basis that the prosecutor there expressed his personal belief in the propriety of the death penalty, emphasized his position of authority in the county as prosecutor, attempted to associate the defendant with several well-known mass murderers, appealed to the jurors' personal fears and emotions, and asked the jurors to "kill" the defendant. Weaver, 912 S.W.2d at 513. The court decided that although the Eighth Circuit had concluded the totality of the circumstances rendered the penalty phase in Newlon fundamentally unfair, the arguments in this case did not rise to that level. Id.

The prosecutor's statement that if the jury did not return a sentence of death there was no point in having the death penalty, was improper for the same reasons discussed above with respect to the similar statements made during the initial penalty phase arguments. This constituted a statement of the

prosecutor's expression of personal belief in the propriety of the death sentence for petitioner, and sought to intimidate the jury into returning a verdict of death. The effect of the trial court's instruction to the jury to disregard the statement is difficult to ascertain from the record, particularly as the court did not sustain defense counsel's objection to similar statements made by the prosecutor earlier.

The second statement equates the jury's task of reaching a penalty verdict with the duties of soldiers during war, and urges them to gather the courage necessary to do their duty of sentencing the petitioner to death. Aspects of this statement, which was not addressed by the Missouri Supreme Court, are clearly improper as seeking to appeal to the jurors' passions and prejudices. The statement was "calculated to remove reason and responsibility from the sentencing process."[6] Newlon, 885

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[6]The Court includes the following quotation from the record solely to show that the prosecutor's intent in making this argument was to inflame the jurors' passions and disengage their sense of rational, reasoned deliberation. This quotation was not included in the record before the Missouri Supreme Court, and does not figure into this Court's decision. After the trial court overruled counsel's objection to the prosecutor's argument concerning Patton, the prosecutor continued and concluded his rebuttal argument as follows:

> He said, "You'll know what to do." Well, last July, Charles Taylor's face was a pile of goo and his brains were hanging out. You know what to do. Yesterday, you made the decision with your brain and you made the right decision. Today, you've got to reach down into your belly, because that's where the death penalty comes from; it comes from your belly. You've got to reach down there and say, William Weaver, we

F.2d at 1338 (quoting Newlon, 693 F. Supp. at 808). The Constitution requires juries to impose the death penalty in a rational, deliberate manner. Shurn, 177 F.3d at 668 (Wollman, J., concurring).

The prosecutor's statement analogizing imposition of the death penalty to killing in war was permissible to the extent it "implied that imposing death, while difficult, is at times sanctioned by the state because of compelling reasons (national security or deterring crime)." Brooks, 762 F.2d at 1412. The prosecutor's statement was improper in that the role of a capital sentencing jury under Missouri law cannot be analogized to the role of a soldier ordered to kill the enemy, as the jury is bound to exercise broad discretion and independent judgment and reason in reaching its verdict. See id.; Newlon, 693 F. Supp. at 806. "The main thrust of death penalty jurisprudence since Furman v. Georgia, 408 U.S. 238 (1972), has been the need for guided discretion in the sentencing body's individualized consideration of the capital defendant. See, e.g., Zant v. Stephens, [462 U.S.862, 879 (1983)]. Conceiving of jurors as soldiers undermines the crucial discretionary element required by the Eighth Amendment." Brooks, 762 F.2d at 1413.

The Court having carefully considered the record as a whole concludes that this argument, permitted by the trial court over defense counsel's objection, "infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts, 137 F.3d at 1066 (citing Darden, 477 U.S. at 181). Although the statement occurred during final rebuttal, "a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is

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sentence you to die. You know what to do. Please, have the courage to do it. Thank you.

Tr. on Appeal, Vol. V., p. 1783.

mandated." United States v. Cannon, 88 F.3d 1495, 1503 (8th Cir. 1996) (internal punctuation and citation omitted). The jury in this case was subjected to a "relentless, focused, uncorrected argument . . . calculated to remove reason and responsibility from the sentencing process." Newlon, 885 F.2d at 1338 (quoting Newlon, 693 F. Supp. at 808).

Thus, the Court concludes plaintiff has established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. This aspect of the prosecutor's closing argument so clearly violated petitioner's due process rights by removing reason and responsibility from the sentencing process and inflaming passion and prejudice that it was unreasonable for the Missouri Supreme Court to conclude there was no error.[7]

d. Claim 2.M.

Petitioner objects to the prosecutor's arguments during the penalty phase (1) that the death sentence was appropriate due to petitioner's connection to the Shurn family and their drug operation (Tr. 1760, 1776, 1777), on the basis there was no evidence petitioner had knowledge of the Shurn family's drug trade; (2) that the death penalty is a deterrent (Tr.1778-79), as being without factual basis; and (3) concerning the "war on drugs" (Tr. 1759, 1768, 1776-77, 1779, 1781), as being intended to appeal to the jury's passions and inflame them.

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[7]The Court notes the Missouri Supreme Court did not find that Mr. Westfall's closing arguments violated due process principles in either Newlon or Shurn, although the Eighth Circuit Court of Appeals did. See State v. Newlon, 627 S.W.2d 606 (Mo. 1982) (en banc); State v. Shurn, 866 S.W.2d 447 (Mo. 1993) (en banc).

The Court will not consider petitioner's point in Claim 2.M. concerning the prosecutor's argument linking him to the Shurn family and its drug trade, because this point was not raised before the Missouri Supreme Court, and as a result is procedurally defaulted. See LaRette, 44 F.3d 681.

With respect to the death-penalty-as-deterrent argument, the prosecutor stated during rebuttal penalty phase closing argument:

> We can't bring Charles Taylor back to life, but we can save other lives. The death penalty deters. I'm convinced of that. People can argue for a thousand years whether it does or not, but I'm convinced it does. It doesn't deter passion killings. It doesn't deter crazed people who kill. But it deters business killings like this. If some of those people really though they faced the prospect of a death penalty, some of them wouldn't do it.
>
> How do I ever prove to you with statistics how many lives were saved? I mean the old analogy is a lighthouse. I don't know how many shipwrecks a lighthouse prevents because we don't have statistics on those that don't occur. If it doesn't occur, it doesn't go down on paper. Yet, many shipwrecks are avoided because of a lighthouse. If a death penalty can save a life, we don't know because the murder won't occur. We don't have statistics of the innocent victims that might be saved instead of being killed at the hands of a convicted murderer. (Tr. 1778-79).

The Missouri Supreme Court found this argument to be reasonable, based on the fact that the crime had been planned for the purpose of killing a witness, and to advance "what was

apparently a very violent drug enterprise[.]" Weaver, 912 S.W.2d at 514. The court concluded this evidence permitted an inference that petitioner had a high propensity for violent conduct in the future. Id.

The Supreme Court has recognized the inconclusive nature of scholarly debate on the deterrent effect of the death penalty, and has stated that while capital punishment has "little or no deterrent effect" on some murderers, it "undoubtedly" is a significant deterrent for others. Gregg v. Georgia, 428 U.S. 153, 185-86 (1976). Therefore, the prosecutor's argument urging the jury to consider the deterrent effect of the death penalty was not improper, and it was not necessary that the prosecutor provide evidence to establish a link between the death penalty and deterrence. See Brooks, 762 F.2d at 1409.

The Court concludes petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

With respect to the "war on drugs" arguments, the prosecutor stated during the initial penalty phase closing argument:

> It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to tell the Williams Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

> Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shum? Of course, you would. It would have been self-defense. Well, it was right to kill then and it's right to **kill him now**. (Tr. 1759) (Emphasis added).

The prosecutor later stated:

> This case – I guess it's one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.
>
> When it comes time after Ms. Black talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business. (Tr. 1768).

During rebuttal penalty phase argument, the prosecutor stated:

> And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message

instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced you're guilty, we're going to give you life in prison? That's not the right message. (Tr. 1776).

. . . . .

The message has to be death for these types of people. That's the only message they are going to understand.

The one thing you've got to get into your head, this is far more important then William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that. (Tr. 1777).

. . . . .

You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in

> exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do. (Tr. 1779).
>
> . . . . .
>
> It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't. (Tr. 1781-82).

Defense counsel objected to the last argument as improper because it was personalizing the case. The trial court sustained the objection and granted defense counsel's request to instruct the jury to disregard the last comment. (Tr. 1782).

The Missouri Supreme Court concluded that while the remarks concerning the prosecutor's position as prosecuting attorney of the county were improper, defense counsel's objections were properly sustained, and the curative instruction given to the jury to disregard the remarks was sufficient to avoid depriving the defendant of a fair trial. Although the "war on drugs" argument was presented to the Missouri Supreme Court, that court did not specifically address the issue. The court stated, "Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase," Weaver, 912 S.W.2d at 514, and discussed several points, but did not devote any discussion to the "war on drugs" point. The Court will address the merits of this claim. See Coleman, 501 U.S. at 732-35 (in the absence of a clear and express statement declaring otherwise, an ambiguous state court decision is presumed to be made on the basis of the court's belief that federal law required such decision, thus permitting

the federal habeas court to address the petition).

It is clear that a prosecutor may ask jurors to act as the "conscience of the community" as long as the comments are not intended to inflame the passions of the jury. United States v. Koon, 34 F.3d 1416, 1444 (9th Cir. 1994), aff'd in part and rev'd in part, 518 U.S. 81 (1996); United States v. Sanchez-Sotelo, 8 F.3d 202, 211 (5th Cir. 1993), cert. denied, 511 U.S. 1023 (1994); United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992). Prosecutors in drug cases "may stress to the jury the seriousness of drug charges and comment on the gravity of this county's drug problem." United States v. Dominguez, 835 F.2d 694, 700 (7th Cir. 1987), cert. denied, 485 U.S. 965 (1988). Prosecutors may not, however, argue that a jury should convict to make a statement against crime in general or to deter future crime as a matter separate and apart from the issue of the defendant's guilt. This kind of argument is improper because "[t]he amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear." United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985). Explicit references to the jury "making a statement" are patently inappropriate because they invite the jury to satisfy its passions by looking beyond the evidence before it in rendering a verdict. See, e.g., Arrieta-Agressot v. United States, 3 F.3d 525, 527 (1st Cir. 1993) (vacating conviction where the prosecutor throughout closing argument "urged the jury to view this case as a battle in the war against drugs, and the defendants as enemy soldiers"); Johnson, 968 F.2d at 771 (Eighth Circuit held improper the prosecutor's exhorting jury in drug case to act as a "bulwark against . . . putting this poison on the streets"); United States v. Solivan, 937 F.2d 1146, 1148 (6th Cir. 1991) (holding improper the prosecutor's comment, "And I'm asking you to tell her and all of the other drug dealers like her that we don't want that stuff in Northern Kentucky . . .").

In this case, the prosecutor's comments clearly and

repeatedly crossed the line of propriety and were unduly inflammatory and improper. The prosecutor stated on numerous occasions that the jury should look beyond the petitioner, and told them, "This isn't personal. This is business." The gist of the prosecutor's argument is captured in the following quotation:

> [T]his is far more important then William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community.

Tr. on Appeal, Vol. V., p. 1777.

This type of argument is highly improper because it seeks death for petitioner in order to send a message to the broad society of drug dealers and murderers not only in St. Louis, but the entire world. Petitioner thus bears the burden of all drug dealers and murderers. This undermines the crucial requirement that sentencing considerations be individualized by introducing the improper suggestion that petitioner be killed merely to send a message to others. See Brooks, 762 F.2d at 1413.

In addition, interspersed with the prosecutor's "send a message" arguments were two other highly improper arguments. First, the prosecutor told the jury "it's right to kill him now." (Tr. 1759) The Eighth Circuit found a similar statement to be prejudicial and improper in both Newlon, 885 F.2d at 1335, and Shurn, 177 F.3d at 667. Judge Wollman, concurring in the Shurn opinion, stated:

> To me, the statements "[K]ill him now. Kill him now," and "Kill Daryl Shurn" are an appeal to blood lust and mob justice rather than a call

> for the jury to return a sentence of death after calm, reasoned deliberation. This strident appeal to primitive emotion could not have done other than to touch the raw nerve of vengeance that lies within us all. The resulting diminution of the jury's sense of responsibility under mined the Eighth Amendment's heightened need for the responsible and reliable exercise of sentencing discretion in capital cases.

Shurn, 177 F.3d at 668. As the Supreme Court has instructed, the constitution requires that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. at 358.

Second, the prosecutor emphasized his position of authority by stating that he was the "prosecuting attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." Tr. on Appeal, Vol. V., pp. 1781-82. It is improper for a prosecutor to tell a jury that an authoritative source has deemed the death penalty appropriate in a particular case, because this creates a danger the jury will defer to an expert's legal judgment in its choice of penalty. See Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); see also Brooks, 762 F.2d at 1410 ("Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required. This kind of abuse plays upon the jury's susceptibility to credit the prosecutor's viewpoint.")

The Court having carefully considered the record as a whole, concludes that the "war on drugs" arguments "infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts, 137 F.3d at 1066

(citing Darden, 477 U.S. at 181). The jury in this case was subjected to a "relentless, focused, uncorrected argument . . . calculated to remove reason and responsibility from the sentencing process." Newlon, 885 F.2d at 1338 (quoting Newlon, 693 F. Supp. at 808).

Thus, the Court concludes plaintiff has established that the decision of the Missouri Supreme Court, which implicitly found the "war on drugs" argument constitutionally permissible, involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. This aspect of the prosecutor's closing argument clearly violated petitioner's due process rights by removing reason and responsibility from the sentencing process, inflaming passion and prejudice, and drawing the jury's attention away from the individualized decision it was required to make with respect to petitioner. As a result, it was unreasonable for the Missouri Supreme Court to conclude there was no constitutional error.

3. Totality of the Circumstances.

In order to decide the effect of the prosecutor's improper remarks, the Court now examines the totality of the circumstances and the remarks within the context of the entire penalty phase. See United States v. Young, 470 U.S. at 11-12. During the penalty phase, the prosecutor argued his personal opinions, improperly urged the jury to disregard the individual circumstances of the petitioner and instead to send a message to all drug dealers and murderers everywhere, repeatedly appealed to the jurors' fears and emotions, told them to kill petitioner, emphasized his position of authority, analogized the role of the capital sentencing jury to that of soldiers carrying out duties in wartime, and argued irrelevant and immaterial issues in an attempt to inflame the jury's passions and prejudices. The arguments in this case bear many similarities to the arguments in Newlon and Shurn, which the Eighth Circuit found to violate

the due process rights of the petitioners in those cases.

The majority of defense counsel's objections to the improper arguments were overruled. The prosecutor's remarks during the rebuttal penalty phase argument were not invited by defense counsel, and counsel had no opportunity to respond to these arguments except by objection. The prosecutor's improper remarks were so many and so permeated the penalty phase arguments that "[t]he improper argument would have had a significant prejudicial effect on the jurors[,]" Copeland, 232 F.3d at 975, even though the jury was instructed that arguments of counsel are not evidence. The prosecutor's remarks were not isolated, but rather "formed the crux of the prosecutor's argument for imposing the death penalty." Copeland, 232 F.3d at 975. The evidence against petitioner in this case was strong but not overwhelming, as defense counsel did a creditable job of calling into question the eyewitnesses' descriptions of the shooter, in particular focusing on the discrepancy between the color of the shooter's clothing and the color of petitioner's clothing. Several mitigating circumstances were submitted for the jury's consideration. The jury agreed on punishment after five hours of deliberation, but did so only after being subjected to a "relentless, focused, uncorrected argument . . . calculated to remove reason and responsibility from the sentencing process." Newlon, 885 F.2d at 1338.

Applying the appropriate standard of review to the instant case, the Court concludes that the prosecutor's penalty phase closing argument so infected the trial with unfairness as to make the resulting sentence of death a denial of due process. It was unreasonable for the Missouri Supreme Court to conclude, in light of Supreme Court precedent, that the argument did not result in a deprivation of due process. Copeland, 232 F.3d at 975. For the foregoing reasons, the Court concludes petitioner has established that the decision of the Missouri Supreme Court with respect to the totality of the penalty phase closing argument involved an unreasonable

application of clearly established federal law as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be granted with respect to the foregoing aspects of Claim Two concerning the penalty phase.

B. Claim Three - Prosecuting Attorney's Investigator Posing as Juror.

Petitioner argues that his conviction occurred in violation of his Sixth, Eighth and Fourteenth Amendment rights as a result of an investigator for the prosecuting attorney's office posing as a juror and mingling with the jurors for several days. Petitioner states that during jury selection, the investigator wore a juror badge and provided "security" because he believed that individuals coming into the courtroom might be concealing guns. The investigator's concern was conveyed to the prosecuting attorney. The trial court was then advised, and announced in open court that anyone returning to the courtroom would be searched. Petitioner asserts that the mere fact an investigator for the prosecuting attorney's office placed himself in a position which allowed him to mingle with jurors on a death penalty case for several days is misconduct which requires reversal due to structural error.

Petitioner asserts that one juror who served on the case, Mr. Smith, knew the investigator, as they had worked together at a medical center. The juror also knew the investigator worked for the prosecuting attorney's office. There was evidence Juror Smith approached the investigator and spoke to him. Petitioner asserts that the juror's actions combined with the investigator's conduct created an atmosphere of undue influence, and that it is doubtful the juror gave due and fair consideration to the facts as a result of his acquaintance with the investigator, and the investigator's presence to provide "security."

Petitioner asserts the trial court erred and violated his Fourteenth Amendment due process rights by refusing to conduct a hearing into the investigator's misconduct, when petitioner's counsel requested a hearing prior to the guilty phase closing argument and again prior to the penalty phase arguments. Petitioner also asserts that the State has not met its burden to show that prejudice did not result from the contact between the investigator and the juror, citing United States v. Hall, 85 F.3d 367, 371 (8th Cir. 1996).

Petitioner presented this issue to the Missouri Supreme Court and the issue was resolved by that Court as follows:

> In his third point, Weaver complains that the trial court erred in failing to grant either a hearing before the verdict or a new trial after it was disclosed that the state's investigator, Lawrence Freeman, posed as a juror, wore a juror button, and mingled with the venire panel during the first day of jury selection either while the members of the venire panel were in the hallway outside the courtroom or in a jury assembly area on a separate floor.
>
> During the early stages of the trial, Freeman became alarmed by a group of persons he believed to be members of the Weaver family who were standing near the courtroom where jury selection was taking place. According to Freeman, both men and women were carrying Gucci bags or purses capable of concealing weapons. Freeman responded by obtaining a juror badge from one of the court's staff in order to "provide security." While wearing the juror badge, Freeman was watching the persons near the courtroom door when he was approached by Mr. Smith, one of those who was ultimately

selected to serve as a juror. Smith spoke to Freeman but was told by Freeman that he could not talk because Freeman had been called to jury duty. Freeman claimed to have gotten word to the prosecutor about the bags, who informed the judge. When the judge announced that all persons entering the courtroom would be searched, the persons with the bags left.

Defense counsel observed Smith and Freeman talking, knew Freeman was an investigator for the prosecutor, and also knew that Smith was a juror. However, she did not bring her information to the attention of the trial judge prior to the trial by moving to strike Smith for cause and did not use a peremptory strike to remove Smith from the jury. Defense counsel first brought the matter to the attention of the trial judge during the instructions conference. The trial judge was concerned that an interrogation of the jurors at that time about what had occurred before the trial might be disruptive and so did not take immediate action. After the jury had completed its deliberations, the trial judge inquired before the jurors were discharged if any of them had contact with Freeman during the trial or whether Freeman had attempted to make any effort to discuss with any of them anything regarding the case. Juror Smith replied, "I know him. I spoke to him before the trial." There is nothing in the record to indicate that Freeman spoke with Smith about the subject matter of the trial.

Without a doubt, the court employee who gave the juror button to Freeman should be reprimanded, and Freeman's conduct was

> thoughtless, if not bizarre. Trial judges, lawyers, and those who are assigned to provide security and look after the needs of jurors while they are being selected, hearing evidence or deliberating must constantly guard against any outside influence or distraction.
>
> Nevertheless, Freeman's actions do not rise to the level of *State v. Post*, 804 S.W.2d 862 (Mo.App. 1991), where a deputy sheriff and a police officer not assigned to the case mingled with jurors at their hotel rooms, and one deputy and a juror engaged in sexual improprieties such that the jury had been so distracted that it could not give "due and fair consideration of the facts." *Id.* at 862-63.
>
> Where misconduct involving jurors during the progress of the trial is alleged, the verdict will be set aside unless the state affirmatively shows that the jurors were not subject to improper influences. *State v. Edmondson*, 461 S.W.2d 713, 723 (Mo. 1971). In this case, where the facts are fully disclosed and they conclusively demonstrate an absence of prejudice to the defendant and an absence of any improper influence on the juror in question there is no prejudice. Under these circumstances, Weaver is not entitled to a new trial.

Resp. Ex. G at 13-14; Weaver, 912 S.W.2d at 511-12.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he

can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

The Sixth Amendment guarantees a criminal defendant the right to an impartial jury. Private communications between an outside party and a juror raise Sixth Amendment concerns. See Parker v. Gladden, 385 U.S. 363, 364 (1966) (per curiam). In the direct appeal context, the Supreme Court has stated that "any private communication [or] contact . . . with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." Remmer v. United States, 347 U.S. 227, 229 (1954); see United States v. Caldwell, 83 F.3d 954, 956 (8th Cir. 1996) (same). The Supreme Court has made clear, however, that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." Smith v. Phillips, 455 U.S. 209, 217 (1982). Instead, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Id.

The Eighth Circuit has stated that in the habeas context, Remmer does not establish a rule that any extrajudicial communication with a juror is presumed to deprive a criminal defendant of due process under the Fourteenth Amendment. Boykin v. Leapley, 28 F.3d 788, 790 (8th Cir. 1994); see also Fullwood v. Lee, 290 F.3d 663, 677 (4th Cir. 2002) (applying Remmer in habeas context; holding that when a habeas

petitioner bases a juror bias claim on improper communication between a juror and a nonjuror, "he must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict . . . . [T]he government [then] bears the burden of demonstrating the absence of prejudice."), cert. denied, 123 S. Ct. 890 (2003).

In a § 2254 habeas proceeding, "a federal court's review of alleged due process violations stemming from a state court conviction is narrow." Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir.), cert. denied, 483 U.S. 1023 (1987). Different standards and burdens of proof apply when federal courts consider direct appeal claims in federal criminal trials and habeas corpus review of state criminal convictions. Id., n.4. "Thus, not every trial error that might result in reversal of a federal conviction on direct appeal would mandate the same result in a § 2254 review of a state court conviction, where we may consider only errors of constitutional magnitude." Id.[8]

The Missouri Supreme Court found there was no evidence in the record to show that the investigator had spoken with Juror Smith about the subject matter of the case. The Court concluded that while the investigator's conduct was improper, petitioner had not been prejudiced by it. The record shows that after the verdict was rendered, the trial judge inquired whether any of the jurors had been approached by Larry Freeman during the trial, and whether he had spoken to them. Juror Smith answered that he knew Freemen, and spoke

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[8]The cases petitioner relies on are all direct criminal appeals, and as such, are not controlling. See Turner v. Louisiana, 379 U.S. 466 (1965); United States v. Hall, 85 F.3d 367, 371 (8th Cir. 1996); United States v. Caldwell, 83 F.3d 954 (8th Cir. 1996); United States v. Delaney, 732 F.2d 639, 642 (8th Cir. 1984).

to him before Smith had been selected as a juror and before the case began. Smith denied that he spoke to Freeman about the case. Tr., Vol. V, pp. 1786-87. Upon further questioning by petitioner's trial counsel, Juror Smith stated the conversation with Freeman consisted of only general topics: "Oh, just how you been doing and hadn't seen him since the last time I was here because I sometimes bring patients here and I run into him. Nothing concerning this." Id. at 1787.

The most petitioner can establish is that a conversation took place between the investigator, Freeman, and Juror Smith. Petitioner has not established either that the conversation concerned the trial, or that he was actually prejudiced. Where a habeas petitioner does not "establish this threshold condition," Remmer is inapplicable. O'Dell v. Armontrout, 878 F.2d 1076, 1080 (8th Cir. 1989), cert. denied, 493 U.S. 1037 (1990).

Petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Lomholt, 2003 WL 1961035, *2. Moreover, the Court finds that the Missouri Supreme Court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Kinder, 272 F.3d at 538. Therefore, petitioner's § 2254 petition for habeas corpus relief will be denied with respect to Claim Three.

C.-E. Claims Four, Five and Six - Brady Violation - Prosecutor's Failure to Disclose Agreement with Witness; Failure to Disclose Police Dispatch Tape; Failure to Disclose Description of Suspect.

Petitioner argues that his conviction occurred in violation of his Sixth, Eighth and Fourteenth Amendment and

due process rights because the prosecutor failed to disclose prior to trial the entire agreement between a State's witness, Robert "Dutch" Tabler, and the State and all circumstances that would affect the witness' credibility. Tabler testified at trial that petitioner admitted he was a "hit man" who along with Daryl Shurn had killed Charles Taylor because Taylor was a potential witness against one of Shurn's brothers, and that petitioner's defense at trial would be misidentification. Petitioner asserts that the following material impeachment information was not disclosed: (1) The prosecutor's original recommendation was a five-year sentence to be served consecutively to Tabler's parole revocation; (2) the original bond was set at $500,000 and the prosecutor filed a motion requesting the bond not be reduced or satisfied by a percentage or property bond; (3) the prosecutor informed Tabler's defense attorney that he would consider recommending early release in exchange for Tabler's testimony; and (4) Tabler had used a false name when arrested.

Petitioner presented this issue to the Missouri Supreme Court and the issue was resolved by that Court as follows:

> Weaver complains that the prosecutor failed to disclose all evidence favorable to the accused in response to his pretrial requests. The details of the state's response to Weaver's pretrial request were not included in the defendant's record filed on appeal. Neither was the response to the request presented at the post-conviction hearing. As best can be determined from the record, the following apparently was disclosed to defense counsel prior to trial:
>
> Tabler had been an inmate at the St. Louis County Correctional Facility for nine months prior to trial. Charges were pending against him for receiving stolen property and a misdemeanor

offense for possession of marijuana. His prior convictions included sodomy and oral copulation in 1980 in California, for which he was sentenced to three years in prison and served two, rape in 1983 in California, upon which he received a three-year sentence and served twenty-two months in prison, and a possession of methamphetamines conviction in 1986 in California for which Tabler received six months, four of which were served. It was also disclosed that Tabler was on parole from the state of California at the time of trial and was facing approximately a year and a half in prison there. Finally, it was disclosed that Tabler had made a deal with the state that in exchange for his testimony, the state would recommend a year for the receiving stolen property charge and six months for the possession of marijuana charge. The record also disclosed that Tabler had been charged as a persistent offender and was subject to an extended term of up to sixteen years but, because of the agreement made by the state, Tabler knew he could possibly get out of prison in five months time.

Weaver complains here that his constitutional right to a fair trial was violated because the state failed to disclose, in addition to the above, and (2) prior to the time Tabler came forward with the information about Weaver, he had been offered a five year sentence; (2) Tabler gave a false name when initially arrested; and (3) Tabler's bond had been set at $500,000.

The United States Supreme Court has held that the suppression by the prosecution of evidence favorable to an accused upon request violates

due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A due process violation occurs "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 676 (1985). A reasonable probability of a different outcome exists where the failure to disclose the evidence "undermines confidence in the outcome of the trial." *Id.* at 682. Considering the information that was disclosed by the state showing Tabler to have been convicted of multiple contemptible crimes and that his testimony was given in exchange for an extremely generous deal by the state makes the failure to disclose complained of by the defendant pale in comparison. The absence of the allegedly undisclosed evidence does not undermine confidence in the verdict. *See Kyles v. Whitley*, 514 U.S. 419, [434] (1995).

In any event, the defendant has failed to make clear what was and was not disclosed prior to trial and has put this Court in the position of having to parse through the record to determine exactly what was not disclosed. That alone would be sufficient to deny this claim without further discussion. However, because this is a capital case, the Court has carefully reviewed the record before resolving this point against Weaver.

See Respondent's Ex. G, p. 16; Weaver, 912 S.W.2d at 514-15.

Petitioner also argues that his conviction occurred in violation of his due process rights because the prosecutor failed to disclose prior to trial (1) a police emergency tape which contained a dispatched description of the suspects involved in the shooting along with a description of the vehicle; and (2) a handwritten notation on an arrest record in the prosecutor's file stating "defendant in maroon jacket." Petitioner asserts that the tape, which was never produced, was significant and material in that it contained a description of the suspect soon after the shooting. Petitioner asserts that the handwritten notation was material to his guilt and its materiality was increased because it supported the testimony of witness Conrad Wragg, who testified the shooting was done by a black male in a burgundy track suit.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> Defendant faults the prosecutor for allegedly failing to disclose a tape of a call to an emergency "911" number reporting that Taylor had been shot and giving a description of the suspect and for failing to disclose a notation on an arrest record in the prosecutor's file noting "D in maroon jacket." It is argued that the contents of the 911 tape and the notation on the police record "may have caused any description contained in the 911 tape to take on greater significance for purposes of additional discovery." The argument fails to disclose what significance the 911 tapes [sic] had to the defense. The argument also fails to disclose what relevance the notation "D in maroon jacket" might have had. To have any significance, the two matters require that a series of assumptions be made favorable to defendant's theory before a failure to disclose

> can be shown in any way to have been material or exculpatory. Here, Weaver has made no showing as to the materiality or exculpatory nature of the tape or the notation. A defendant is not entitled to information on the mere possibility that it might be helpful but must make some "plausible showing" how the information would have been material or favorable. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987). The mere possibility that these undisclosed items might have led to future discovery does not implicate a due process violation. *See State v. Parker*, 886 S.W.2d 908, 916-17 (Mo. banc 1994).

Resp. Ex. G, p. 18; State v. Weaver, 912 S.W.2d at 517.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. The United States Supreme Court has clearly delineated the standard for establishing a due process violation based on the prosecutor's failure to disclose evidence material to the defense. A Brady violation occurs where (1) the

prosecutor suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the issue of guilt or punishment. Brady v. Maryland, 373 U.S. at 87; United States v. Walrath, 324 F.3d 966, 969 (8th Cir. 2003). To obtain habeas relief on a Brady claim, a petitioner must show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 676 (1985). A reasonable probability of a different outcome exists where the failure to disclose the evidence "undermines confidence in the outcome of the trial." Id. at 678. The cumulative effect of suppressed evidence is considered for purposes of determining its materiality. Kyles v. Whitley, 514 U.S. 419, 436 & n.10 (1995). "A conviction will stand where a Brady violation was not prejudicial and amounts to harmless error." Walrath, 324 F.3d at 969 (internal punctuation and citation omitted).

The Missouri Supreme Court properly applied the law set forth in Brady v. Maryland and United States v. Bagley to conclude that the undisclosed evidence here did not undermine confidence in the verdict. As described by the Missouri Supreme Court, the State turned over a significant amount of material concerning Tabler, which it concluded made the allegedly undisclosed material "pale in comparison." A thorough review of the record supports the Missouri Supreme Court's conclusion. Petitioner's trial counsel spent a significant amount of time focusing the jury's attention on Tabler's criminal history, the relatively minor nature of the charges Tabler was facing and the lengthy prison term he might be sentenced to but for his testimony against petitioner, Tabler's ability to obtain access to petitioner's legal papers while they were confined together, and Tabler's motives in testifying. In particular, trial counsel repeatedly pointed out that Tabler was positioned to get a five-month sentence instead of a sixteen-year sentence, in return for his testimony against Weaver. See Tr. on Appeal, Vol. III, pp. 990-92, 995-1000, 1002-03, 1014-17. There is no reasonable probability the result would have been

different had the additional matters been disclosed.

With respect to the 911 tape and the notation on the arrest record, the Missouri Supreme Court found that petitioner did not explain the significance the 911 tape had to the defense, and failed to disclose the relevance of the notation "D in maroon jacket," and thus failed to establish that the allegedly suppressed evidence was material. A thorough review of the record supports the Missouri Supreme Court's conclusion. Moreover, the police dispatcher who handled the radio calls concerning the shooting of Taylor, Pamela O'Donnell, testified that she received a call about the shooting which described the assailants as two black males in a dark blue car, one wearing maroon clothing, and she put out a dispatch including that description. Tr. on Appeal, Vol. IV, pp. 1584-85; 1592-93. A defense witness named Lawrence Ducharme testified that he saw a black man run from the woods after he heard shots, and the man was wearing a "red, wine, maybe burgundy colored like a jogging type suit" with long pants. Tr. on Appeal, Vol. III, pp. 1146-47, 1150. Conrad Wragg, the witness petitioner refers to, testified that after he heard shots, he looked out the window and saw a black male wearing a burgundy track suit with long pants. Tr. on Appeal, Vol. IV, p. 1595. Wragg later went to the Normandy Police Station and gave a written statement that he had seen a black male wearing a plain burgundy sweatsuit, and the statement was admitted into evidence. Id. at 1597-1601. State witness Christine Coslick testified that she heard shots and saw two black men near the woods, one of whom was wearing a maroon shirt. Tr. on Appeal, Vol. II, p. 665. State witness Wendy Holliday testified that she heard shots and saw two black men chasing a third man, and the man directly behind the victim was wearing "a burgundy colored top and burgundy pants, like maroon colored pants." Id., p. 707. There was significant evidence presented at trial concerning the clothing petitioner was wearing and the clothing witnesses described, to support petitioner's theory of misidentification. The Court concludes there is no reasonable probability the result would

have been different had this evidence been disclosed, when the effect of all the allegedly suppressed material is considered cumulatively.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. See Linehan, 315 F.3d at 924. Moreover, the Court finds the Missouri Supreme Court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims Four, Five and Six.

F. Claim Seven - Admission of Hearsay Evidence - Confrontation Clause Errors.

Petitioner asserts that the trial court improperly allowed hearsay evidence of the victim's state of mind to explain why he was in possession of a gun, and the introduction of this evidence violated the Confrontation Clause of the Sixth Amendment. Petitioner asserts that the state of mind exception to the hearsay rule did not apply, because he denied any participation in the shooting and did not raise self-defense or accident defenses, and therefore the victim's state of mind was completely irrelevant. Petitioner further asserts there was no evidence he ever threatened the victim or was aware the victim was a witness for the federal government against Larry Shurn, his co-defendant's brother. Petitioner asserts that at trial, the victim's wife, Juanita Taylor, testified that her husband feared for his life, that Daryl Shurn intended to kill him, and that Daryl Shurn gave her husband the "thumbs down" gesture when they saw each other in court. A St. Louis Police Department detective, Jerry Leyshock, testified the "word on the street" was that the Shurns intended to kill Taylor.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> In his second point, Weaver claims the trial court erred in admitting hearsay evidence. During cross-examination of police officer Cantwell, defense counsel elicited that the police found a briefcase belonging to Taylor near his body and that it contained a cocked and loaded .32 caliber handgun. It appears the defense was attempting to use the handgun evidence to create an inference that the victim was a violent person involved in the drug trade.
>
> In response to this evidence, the prosecutor called Taylor's wife and another police office, who collectively testified that Taylor had told them that he was carrying a gun because the word on the street was that Daryl Shurn intended to kill Taylor and that Shurn gave Taylor the "thumbs down" gesture when they saw one another in the city courts building.
>
> In order for evidence to be admissible, it must be relevant, logically tending to prove a fact in issue or corroborate relevant evidence that bears on the principal issue. *State v. Mercer*, 618 S.W.2d 1, 9 (Mo. banc 1981), *cert. denied* 454 U.S. 933 (1981). Weaver argues that because he was not attempting to prove self-defense, and because the briefcase and its contents were not relevant to the defense that he had been misidentified while jogging, evidence of Taylor's motivation for carrying the loaded handgun should not have been admitted. While Weaver is correct that the primary thrust of the defense was misidentification, the defendant

> injected the issue that the victim was carrying a loaded weapon. That tactic was designed to permit the jury to infer that the victim was violent and posed a threat to defendant. Thus, it was defense counsel's tactic to inject into the case the victim's state of mind.
>
> Under the doctrine of curative admissibility, "where the defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *State v. Lingar*, 726 S.W.2d 728, 734-35 (Mo. banc 1987), *cert. denied* 484 U.S. 872 (1987). Under this doctrine, the defendant must first have introduced evidence, even though it might be technically inadmissible evidence. *See State v. Shurn*, 866 S.W.2d 447, 458 (Mo. banc 1993), *cert. denied* 513 U.S. 837 (1994). The victim's statement of fear of the defendant as a reason for carrying the gun was relevant and not unduly prejudicial under the state of mind exception to the hearsay rule. *Id.; State v. Boliek*, 706 S.W.2d 847, 850 (Mo. banc 1986), *cert. denied* 479 U.S. 903 (1986).

Respondent's. Ex. G, pp. 12-13; State v. Weaver, 912 S.W.2d at 510.

The Missouri Supreme Court addressed petitioner's claim only with respect to whether the trial court properly admitted the statements under the state-of-mind exception to the hearsay rule and the doctrine of curative admissibility under Missouri law. The state supreme court did not discuss petitioner's claim that admission of such statements violated the Confrontation Clause. The state court's opinion therefore rests

on adequate and independent state law grounds. It is well established that federal habeas courts are barred from reviewing claims decided on adequate and independent state law grounds. See Coleman, 501 U.S. at 729-30.

Because the Missouri Supreme Court relied on adequate and independent state law grounds in resolving this issue, this Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup v. Delo, 513 U.S. 298, 314-15 (1995). Therefore, dismissal of this claim is appropriate.

In view of the gravity of this proceeding, however, the Court will review the merits of petitioner's Confrontation Clause claim. Petitioner argues that introduction of Taylor's statements violated the Confrontation Clause because the state-of-mind exception is not applicable in this case. Petitioner further argues that introduction of Taylor's statements prejudiced him because it conveyed the impression petitioner acted as a "hit man" to kill Taylor to prevent him from testifying against the Shurns.

A review of the record shows that over relevancy objections by the State, petitioner's trial counsel elicited on cross-examination of police officer Cantwell that Taylor's briefcase had been found at the scene, and contained a loaded, cocked gun. Petitioner referred to and admitted into evidence a photograph of the gun. Tr. on Appeal, Vol. III, pp. 935-38. The statements at issue were admitted in response to this evidence. Juanita Taylor, the victim's wife, testified that Taylor told her he was carrying a gun "because the word was out on the street that Smokey [a nickname for Daryl Shurn] was going to kill him." Id., p. 1098. Juanita Taylor also testified that Taylor

told her he had seen Larry Shurn while at the city courts, and Larry Shurn gave him a "thumbs down" gesture. Id. Detective Leyshock testified that Taylor told him the "word on the street" was that the Shurns were going to kill him, and as a result, Taylor was going to carry a gun. Id., pp.1108-09.

Petitioner's trial counsel objected to these statements as hearsay, irrelevant and prejudicial. Id., pp. 1030-32. The trial court overruled counsel's objections and stated it would admit the testimony for the limited purpose of showing the victim's state of mind. Id., p. 1031-32. In each instance, immediately prior to the witnesses' testimony concerning Taylor's statements, the trial court cautioned the jury that the testimony they were about to hear was "not being admitted to show the truth of the information testified to but is only being admitted for the purpose of showing the state of mind" of the victim. Id., pp. 1098, 1108.

Federal habeas review is limited to determining whether a conviction violated the Constitution, laws or treaties of the United States. Estelle v. McGuire, 502 U.S. 62, 68 (1991). State law governs the admissibility of evidence in a state criminal proceeding. Clark v. Groose, 16 F.3d 960, 963 (8th Cir.), cert. denied, 513 U.S. 834 (1994). To the extent petitioner bases his claim on state law evidentiary rulings, his claim is not cognizable in a habeas proceeding. Estelle, 502 U.S. at 68.

Petitioner also argues that admission of the alleged hearsay statements violated his rights under the Confrontation Clause. A federal court may grant habeas relief where a state court's evidentiary ruling "infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial of due process." Clark, 16 F.3d at 963 (citation omitted). To establish such a violation, petitioner's burden is "much greater than that required on direct appeal and even greater than the showing of plain error." Mendoza v. Leapley,

5 F.3d 341, 342 (8th Cir. 1993).

The Confrontation Clause guarantees a criminal defendant "the right to physically face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (citing Delaware v. Fensterer, 474 U.S. 15, 18-19 (1985)). Petitioner alleges a violation of his right to cross-examine the victim. "[T]he right to confrontation is a trial right, designed to prevent improper restrictions on the types of question that defense counsel may ask during cross-examination." Ritchie, 480 U.S. at 52 (citing California v. Green, 399 U.S. 149 (1970)). Usually the right is satisfied "if defense counsel receives wide latitude at trial to question witnesses." Id. (citing Fensterer, 474 U.S. at 20). The absence of testing of a witness' testimony "calls into question the ultimate integrity of the fact-finding process." Ohio v. Roberts, 448 U.S. 56, 63-64 (1980).

Under certain circumstances, an out-of-court statement is sufficiently reliable to dispense with the usual right to confrontation. In Roberts, the Supreme Court clarified that an out-of-court statement is admissible "only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66. The rationale behind the rule is that "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Idaho v. Wright, 497 U.S. 805, 817 (1990).

The statements that Taylor made to his wife and to Detective Leyshock constitute hearsay. The Missouri Supreme Court addressed this issue, finding that while the primary thrust

of the defense was misidentification, petitioner injected the issue that the victim was carrying a loaded weapon. The state court concluded the evidence was a defense tactic was designed to permit the jury to infer that the victim was violent and posed a threat to the defendant, and thus, was intended to inject into the case the victim's state of mind. The state court then discussed the doctrine of curative admissibility which provides that "where the defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." State v. Lingar, 726 S.W.2d 728, 734-35 (Mo. banc 1987), cert. denied, 484 U.S. 872 (1987). The state court concluded, "The victim's statement of fear of the defendant as a reason for carrying the gun was relevant and not unduly prejudicial under the state of mind exception to the hearsay rule." Respondent's Ex. G, p. 13; State v. Weaver, 912 S.W.2d at 510.

The doctrine of curative admissibility and the state of mind exception to the hearsay rule are analytically distinct. See State v. Armontrout, 8 S.W.3d 99, 111 (Mo. banc 1999), cert. denied, 529 U.S. 1120 (2000). The Missouri Supreme Court's discussion, however, appears to conflate these two issues. The doctrine of curative admissibility applies only where the defendant has initially introduced inadmissible evidence. Goffstein v. State Farm Fire & Cas. Co., 764 F.2d 522, 524 (8th Cir. 1985); State v. Middleton, 998 S.W.2d 520, 528 (Mo. banc 1999), cert. denied, 528 U.S. 1167 (2000). "In that situation, the opposing party may introduce otherwise inadmissible evidence of its own to rebut or explain inferences raised by the first party's evidence." Middleton, 998 S.W.2d at 528 (internal citation omitted). "A party may not . . . introduce inadmissible evidence to rebut inferences raised by the introduction of admissible evidence during cross-examination." Id. (citations omitted). "Absent an exception [to the hearsay rule], hearsay testimony cannot be used to rebut inferences drawn from admissible evidence adduced during cross-examination." Id.

(citations omitted).

Under these principles, if the doctrine of curative admissibility was properly applied, the Missouri Supreme Court necessarily found that evidence Taylor had a gun was irrelevant and erroneously admitted. The Court's discussion of the issue, however, appears to be that the gun evidence was injected to raise a self-defense issue, which would be relevant. Despite the fact that trial counsel introduced evidence of the gun, the defense was strictly based on misidentification, and petitioner denied that he knew or had ever met Taylor, or had any participation in Taylor's killing. There was no evidence from the State's witnesses that Taylor knew petitioner. In closing argument, trial counsel did not argue about or even indirectly allude to the gun or to Taylor's potential for violence. This Court finds it more likely that trial counsel was attempting to plant the idea that Taylor was a man who had enemies, which would support the defense that someone else killed Taylor, or perhaps was attempting to lessen the jury's sympathy for Taylor by depicting him as someone who carried a gun in addition to associating with violent drug dealers.

The Missouri Supreme Court's conclusion that the state of mind exception to the hearsay rule applied is somewhat troublesome. The Court concluded it was relevant that Taylor feared "the defendant" and not unduly prejudicial to admit evidence to explain why Taylor carried the gun, but the testimony of Juanita Taylor and Detective Leyshock was that Taylor feared Daryl Shurn, not William Weaver. It is not clear how the fact that Taylor feared Shurn enough to carry a gun becomes relevant in petitioner's trial.

Assuming for purposes of this opinion that admission of the hearsay testimony from Juanita Taylor and Detective Leyshock was error and violated petitioner's Confrontation Clause rights, the issue is whether petitioner was prejudiced by it. See Chapman v. California, 386 U.S. 18, 21-24 (1967) ("reasonable doubt" standard for harmless error); State v.

Debler, 856 S.W.2d 641, 649 (Mo. banc. 1993). Petitioner argues the evidence was prejudicial because it conveyed the impression petitioner acted as a "hit man" to kill Taylor.

After a careful review of the entire record, the Court concludes that admission of the hearsay testimony was harmless beyond a reasonable doubt. The hearsay testimony was that Taylor feared Daryl Shurn and had seen Larry Shurn give Taylor a "thumbs down" sign; the testimony did not link petitioner to Taylor, or to Larry or Daryl Shurn. Thus, the evidence was not direct and at most allowed an inference as to motive. The other evidence at trial against petitioner was stronger and more directly linked him to Taylor's killing--the eyewitness testimony of a number of witnesses; testimony concerning petitioner's apprehension while running barefoot in Pasadena Hills far from his home, but not far from where Daryl Shurn's car was wrecked; testimony by Police Officer Gardiner that it was petitioner he saw run from Shurn's wrecked car; uncontroverted testimony that petitioner's car was parked in the Mansion Hills apartment parking lot; and testimony that petitioner's keys were found in Daryl Shurn's wrecked car after the accident. Although petitioner's trial counsel worked hard to challenge the State's evidence, the cumulative effect of the circumstantial and direct evidence was strong although not overwhelming, and petitioner's testimony that he was simply jogging in the area after his lover had failed to meet him at the Mansion Hills apartments ultimately offered little in the way of substantive rebuttal to the State's case. For these reasons, the Court can say beyond a reasonable doubt that the hearsay testimony did little, if anything, to strengthen the State's case. As a result, it concludes the error, if any, was harmless. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Seven.

H. Claim Eight - Denial of Rule 29.15 Discovery.

Petitioner argues that his conviction occurred in

violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights when the state motion court denied his request for discovery contained in his Rule 29.15 pleadings, which sought to show that the State's decision to seek death in petitioner's case was made in an arbitrary and discriminatory manner.

Under § 2254, a federal court "[s]hall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Kenley v. Bowersox, 228 F.3d 934 (8th Cir. 2000) (quoting 28 U.S.C. § 2254). The law is well settled that "infirmities in the state's post-conviction remedy procedure cannot serve as a basis for setting aside a valid original conviction. . . . Errors or defects in the state post-conviction proceedings do not, *ipso facto*, render a prisoner's detention unlawful or raise constitutional questions cognizable in habeas corpus proceedings." Kenley, 228 F.3d at 938 (quoting Williams v. State, 640 F.2d 140, 143-44 (8th Cir.), cert. denied, 451 U.S. 990 (1981)).

Petitioner's eighth claim for habeas relief asserts nothing more than an infirmity in the state's postconviction process. As such it is not cognizable in the instant § 2254 proceedings and will be denied.

I. Claim Nine - Autopsy Hearsay.

Petitioner asserts in Claim Nine that his conviction and sentence were obtained in violation of the Fifth, Sixth and Fourteenth Amendments because the trial court allowed, over objection, hearsay testimony relating to the autopsy performed on Taylor following his death. Petitioner asserts that the autopsy was performed by a Dr. Gantner, who did not testify, but testimony was provided by Dr. Turgeon, who did so after merely reviewing the autopsy records. Petitioner states that Dr. Gantner was suffering from heart trouble at the time of trial, but

the record shows he was not truly unavailable to testify. The trial court rejected the suggestion of petitioner's counsel that Dr. Gantner testify by deposition. Petitioner asserts that Dr. Turgeon's testimony as to the manner and means of Taylor's death, i.e., six gunshot wounds to the head, formed the basis for the State's closing argument characterizing the killing as a cold-blooded, execution-type killing of a potential witness.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> Weaver argues that the autopsy report of the victim should not have been admitted into evidence because it was hearsay. One exception to the hearsay rule is that business records, if properly identified, may be admitted. The custodian of the autopsy report testified as to its identity, the mode of preparation and that it was made in the regular course of business. On that basis, the court could receive the report in evidence. § 490.680, RSMo 1994; *State v. Cheatham*, 340 S.W.2d 16, 19 (Mo. 1960); *State v. Jennings*, 555 S.W.2d 366, 367 (Mo.App. 1977).

Respondent's Ex. G, pp. 18-19; State v. Weaver, 912 S.W.2d at 517.

The Missouri Supreme Court addressed petitioner's claim only with respect to whether the trial court properly admitted the statements under the business records exception to the hearsay rule under Missouri law. The state supreme court did not discuss petitioner's claim that admission of such statements violated his federal constitutional rights. The state court's opinion therefore rests on an adequate and independent state law ground. It is well established that federal habeas courts are barred from reviewing claims decided on adequate

and independent state law grounds. See Coleman, 501 U.S. at 729-30.

Because the Missouri Supreme Court relied on adequate and independent state law grounds in resolving this issue, this Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15. Therefore, dismissal of this claim is appropriate.

In view of the gravity of this proceeding, however, the Court will review the merits of petitioner's constitutional claims. Petitioner argues that introduction of the autopsy report violated his Confrontation Clause and due process rights because Dr. Gantner was available to testify. Petitioner further argues that introduction of the autopsy report through Dr. Turgeon prejudiced him because it formed the basis of the prosecutor's argument that this was a cold-blooded, execution-style killing.

Federal habeas review is limited to determining whether a conviction violated the Constitution, laws or treaties of the United States. Estelle, 502 U.S. at 68. State law governs the admissibility of evidence in a state criminal proceeding. Clark, 16 F.3d at 963. To the extent petitioner bases his claim on state law evidentiary rulings, his claim is not cognizable in a habeas proceeding. Estelle, 502 U.S. at 68.

Petitioner also argues that admission of the alleged hearsay statements violated his rights under the Confrontation Clause and due process clause. A federal court may grant habeas relief where a state court's evidentiary ruling "infringes upon a specific constitutional protection or is so prejudicial that

it amounts to a denial of due process." Clark, 16 F.3d at 963 (citation omitted). To establish such a violation, petitioner's burden is "much greater than that required on direct appeal and even greater than the showing of plain error." Mendoza, 5 F.3d at 342.

As previously stated, the Confrontation Clause guarantees a criminal defendant "the right to physically face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. at 51 (citing Fensterer, 474 U.S. at 18-19). Petitioner alleges a violation of his right to cross-examine the author of the autopsy report. "[T]he right to confrontation is a trial right, designed to prevent improper restrictions on the types of question that defense counsel may ask during cross-examination." Ritchie, 480 U.S. at 52 (citing Green, 399 U.S. 149). Usually the right is satisfied "if defense counsel receives wide latitude at trial to question witnesses." Id. (citing Fensterer, 474 U.S. at 20). The absence of testing of a witness' testimony "calls into question the ultimate integrity of the fact-finding process." Ohio v. Roberts, 448 U.S. at 63-64.

Under certain circumstances, an out-of-court statement is sufficiently reliable to dispense with the usual right to confrontation. In Roberts, the Supreme Court clarified that an out-of-court statement is admissible "only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U.S. at 66. The rationale behind the rule is that "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Idaho v. Wright, 497 U.S. at 817.

The Confrontation Clause "does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." Wright, 497 U.S. at 813. The Clause does, however, "operate[] in two separate ways to restrict the range of admissible hearsay." Ohio v. Roberts, 448 U.S. at 65. First, in most cases, "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Id. "A demonstration of unavailability, however, is not always required." Id. at 65, n.7 (citing Dutton v. Evans, 400 U.S. 74 (1970) ("Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness.")) In United States v. Inadi, 475 U.S. 387, 400 (1986), the Court held that the Confrontation Clause does not require a showing of unavailability as a condition to admission of out-of-court statements of a nontestifying co-conspirator, when those statements otherwise satisfied Federal Rule of Evidence 801(d)(2)(E), which excludes from the definition of hearsay a coconspirator's out-of-court statements. In Inadi, the Court limited Ohio v. Roberts to its own specific situation of former testimony, explaining that unavailability was relevant in that context because former testimony seldom had independent value of its own. Id., 475 U.S. at 394. Federal appellate courts have concluded that Inadi's reasoning supports the proposition that reliable out-of-court statements generally can be constitutionally introduced without producing an available declarant. See, e.g., Minner v. Kerby, 30 F.3d 1311, 1314-15 (10th Cir. 1994) (admission of police chemist's laboratory notes did not violate the Confrontation Clause, where the notes had sufficient particularized indicia of reliability, and if the chemist had testified, he likely would have relied on his notes and his knowledge of standard lab procedures); United States v. Johnson, 971 F.2d 562, 572-73 (10th Cir. 1992) (introduction of bank records through testimony of investors, rather than available bank custodian, did not violate Confrontation Clause);

Manocchio v. Moran, 919 F.2d 770, 784 (1st Cir. 1990) (introduction of autopsy report for proving cause of death without personal presence of examining pathologist who prepared report, and absent showing of his unavailability, did not violate Confrontation Clause), cert. denied, 500 U.S. 910 (1991).

Second, the Confrontation Clause authorizes only the admission of hearsay "marked with such trustworthiness that there is no material departure from the general rule." Ohio v. Roberts, 448 U.S. at 65 (internal punctuation and citation omitted). "[C]ertain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection. Id. at 66 (internal punctuation and citation omitted). "Properly administrated the business and public records exceptions would seem to be among the safest of the hearsay exceptions." Id. at 66, n.8 (quoting Comment, 30 La.L.Rev. 651, 668 (1970)). The Supreme Court has also suggested that the necessary "indicia of reliability" requirement can be met where hearsay evidence is supported by "a showing of particularized guarantees of trustworthiness." Idaho v. Wright, 497 U.S. at 816 (citations omitted).

The leading case on the admission of an autopsy report where the available medical examiner was not produced is Manocchio, 919 F.2d 770. In that case, the government sought to introduce an autopsy report about an autopsy performed by a forensic pathologist who had since moved to another country. The testimony of another signer of the report, the keeper of the records, was offered to lay the foundation for admission. Id. at 772. The First Circuit, relying on Inadi, found that the government was not required to establish the examining pathologist's unavailability in order to enter the report into evidence. In a lengthy and thorough opinion, the Court concluded that an autopsy report did not fall within the business records exception or other firmly rooted exception to the

hearsay rule, but did contain particularized guarantees of trustworthiness sufficient to be admissible over a Confrontation Clause objection. 919 F.2d at 773-77. In particular, the First Circuit focused on these factors: (1) the report was properly authenticated at trial as having been prepared by a qualified physician under the auspices of the medical examiner's office in accordance with the established procedures of the office; (2) there was no showing of a possible motivation on the part of the examiner to falsify the report; (3) the report's inclusion of double hearsay from a non-medical police report was, at worst, harmless error where the accuracy of the included information was not at issue; and (4) the report's conclusion of homicide amounted to no more than a restatement of the examiner's medical conclusion that death resulted form the multiple injuries observed on the body. 919 F.2d at 777. The Court stated that statements in the autopsy report which described the condition of the corpse "are reliable for all of the reasons that routine business records or public records are deemed reliable." Id. at 778. The Court explained:

> Like the information contained in business records, the reliability of the descriptive observation portion of autopsy records prepared by state or county medical examiners' offices is enhanced by the routine and repetitive circumstances under which such reports are made. And since the reports are made at the time of the autopsy, their reliability is greater than a later-recollected description by the preparer of the record. Like information contained in public records, reliability is further enhanced by the existence of statutorily regularized procedures and established medical standards according to which autopsies must be performed and reports prepared, and by the fact that autopsies are carried out in a laboratory environment by trained individuals with

specialized qualifications.

Manocchio, 919 F.2d at 778.

In this case, the Missouri Supreme Court concluded that the autopsy report qualified as a business record, an admissible hearsay exception under Missouri evidence law. See Mo. Rev. Stat. § 490.680 (1996). As an initial matter, petitioner has not shown that Dr. Gantner, the examining pathologist, was available. The record shows the testimony at trial was that he was at home, having been recently released from the hospital, awaiting a heart transplant with an automatic pump dripping medication into his lung in preparation for the transplant. Tr. on Appeal, Vol. III, pp. 1053, 1055-56. Petitioner has not presented evidence that Dr. Gantner would have been able to attend the trial and testify. Nonetheless, given the gravity of this case, the Court will assume for purposes of this opinion that Dr. Gantner was available to testify.

This Court concludes, however, that admission of the autopsy report in absence of a showing of the preparer's unavailability did not violate petitioner's Confrontation Clause rights. The custodian of records of the St. Louis County Medical Examiner testified that Dr. Gantner was the Chief Medical Examiner for the county, that Dr. Gantner had performed the autopsy on Charles Taylor on July 6, 1987, prepared an autopsy report and delivered it to her, and that she kept the report with records of autopsies performed in the county. Tr. on Appeal, Vol. III, pp. 1051-52, 1059, 1061. The custodian also testified that the information in autopsy reports is made at or near the time of the occurrences they describe, and that the reports are kept in the ordinary course of business. Id. at 1060.

Dr. Ronald Turgeon, a physician and forensic pathologist who has been employed by the county medical examiner's office since 1981, testified as to Dr. Gantner's

professional education and credentials. Dr. Turgeon testified that he had reviewed the autopsy report Dr. Gantner prepared following Taylor's autopsy. Dr. Turgeon testified from the report that the cause of death was multiple gunshot wounds to the brain, and that Taylor sustained six gunshot wounds to the head, one in the abdomen, one in the back, and a graze wound on the left arm. Tr. on Appeal, Vol. III, pp. 1063-74.

The Supreme Court has established that reliable out-of-court statements generally can be constitutionally introduced without producing an available declarant. Inadi, 475 U.S. 387, 400. Therefore, the mere fact that Dr. Gantner was not produced does not establish a Confrontation Clause violation. This Court concludes that the autopsy report at issue has particularized guarantees of trustworthiness that support its admission into evidence in the absence of the preparer, specifically: (1) the report was properly authenticated at trial as having been prepared by a qualified physician under the auspices of the St. Louis County Medical Examiner's Office; (2) the report was made at or near the time of the autopsy and was kept among medical examiner's office records in the ordinary course of business; (3) there was no showing of a possible motivation on the part of the examiner to falsify the report; and (4) Dr. Turgeon's testimony was limited to the report's observations about the conditions of the corpse, and the cause of death.

The Court also concludes that petitioner has not established that admission of the autopsy report violated his due process rights. In a § 2254 habeas proceeding, "a federal court's review of alleged due process violations stemming from a state court conviction is narrow." Hamilton, 809 F.2d at 470. Petitioner fails to show any prejudice resulting from admission of the autopsy report. Petitioner claims he was prejudiced because the testimony as to the manner of death enabled the prosecutor to argue this was an execution-style killing. What petitioner fails to explain is how the result would have been

different had Dr. Gartner been present to testify about the results of the autopsy. Petitioner offers no evidence that the autopsy was incorrectly done, or that Taylor did not have six gunshot wounds to the head. Petitioner has not met his burden to show that the state court's evidentiary ruling was "so prejudicial that it amounts to a denial of due process." Clark, 16 F.3d at 963 (citation omitted).

For these reasons, the Court concludes that admission of the autopsy report did not violate either petitioner's Confrontation Clause or due process rights. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Nine.

J. Claim Ten - Ineffective Assistance of Trial Counsel.

Petitioner asserts in Claim Ten that his conviction and sentence were obtained in violation of the Fifth, Sixth and Fourteenth Amendments because he was denied effective assistance of counsel. Petitioner asserts that his counsel failed to exercise the customary care and diligence which a reasonably prudent attorney would perform under similar circumstances. Specifically, petitioner asserts that trial counsel was ineffective in the following respects:

Claim 10.B.: Trial counsel failed to object to the testimony of a prosecution witness that petitioner had admitted he was a "hit man" who had committed other murders;

Claim 10.C.: Trial counsel failed to present evidence that the victim, Charles Taylor, always carried a gun.

Claim 10.D.: Trial counsel failed to provide evidence and documents demonstrating the St. Louis County Prosecutor's Office's longstanding practice of striking blacks from jury venire panels.

Claims 10.E. and F.: Trial counsel failed to thoroughly question Officer Cantwell regarding officers' unsuccessful efforts to locate a gun at the scene of Taylor's death.

Claims 10.G and H: Trial counsel failed to object to Missouri Approved Instruction 25, concerning mitigating circumstances.

Claim 10.I.: Trial counsel failed to provide evidence that petitioner had previously been shot while working as a disc jockey.

Claim 10.J.: Trial counsel failed to seek a change of venue due to pretrial publicity regarding Taylor's death and his involvement as a potential witness in the federal prosecution of a drug dealer named Ricky Durham.

Claim 10.K.: Trial counsel failed to object to Police Officers Lee and Cantwell's opinions regarding why gunshot residue was not found on petitioner's hands immediately after his arrest.

Claim 10.L.: Trial counsel failed to call Missouri Highway Patrol chemist Carl Rothove to rebut the testimony of Officers Lee and Cantwell.

Claim 10.M.: Trial counsel failed to adequately cross-examine Officer Cantwell regarding his trial testimony that he did not request gunpowder residue testing of the clothes petitioner was wearing at the time of his arrest.

Claim 10.N.: Trial counsel failed to object to evidence and argument intended by the prosecutor to explain why no gunpowder residue was found on petitioner.

Claim 10.O.: Trial counsel failed to correct a prejudicial statement made by one of the jurors during voir dire, that life

imprisonment is more costly than the death penalty.

Claim 10.P.: Trial counsel failed to impeach Dr. Turgeon regarding his testimony that no bullet fragments were recovered from Taylor's body.

Claim 10.Q.: Trial counsel failed to present ballistic evidence which would have suggested that more than one weapon was used in Taylor's killing.

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must first demonstrate that his attorney failed to exercise the degree of skill and diligence that a reasonably competent attorney would exercise under similar circumstances. Strickland v. Washington, 466 U.S. 668, 687 (1984). This requires the petitioner to show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id.; Sanders v. Trickey, 875 F.2d 205, 207-08 (8th Cir.), cert. denied, 493 U.S. 898 (1989) (the standard of conduct is that of a reasonably competent attorney; to comply with this requirement, petitioner must prove that his counsel's assistance fell below an objective standard of reasonableness, considering all the circumstances faced by the attorney at the time in question). The petitioner must then demonstrate that he suffered prejudice as a result of his attorney's actions. To show the prejudice required by Strickland, the petitioner must demonstrate that counsel's errors were so serious as to render the result of the trial unreliable or the proceeding fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

Because defense counsel is presumed to be effective, Cox v. Wyrick, 642 F.2d 222, 226 (8th Cir.), cert. denied, 451 U.S. 1021 (1981), petitioner bears a heavy burden in proving that counsel has rendered ineffective assistance. Howard v. Wyrick, 720 F.2d 993, 995 (8th Cir. 1983), cert. denied, 466 U.S. 930 (1984); see also Sidebottom v. Delo, 46 F.3d 744, 751

(8th Cir.), cert. denied, 488 U.S. 975 (1995).

The Court begins its analysis with the Missouri Supreme Court's opinion. The Missouri Supreme Court correctly set forth the controlling Strickland standard:

> Under his tenth point, defendant again in violation of Rule 84.04(d) combines a series of eleven claims of ineffective assistance of counsel which he asserts should have been found by the motion court. To prevail, Weaver had to establish before the motion court that trial counsel failed to perform at the degree of skill, care or diligence of a reasonably competent attorney and that the performance was so prejudicial as to undermine the reliability of the result of the trial. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984).

State v. Weaver, 912 S.W.2d at 517.

The Missouri Supreme Court's conclusion that trial counsel did not render ineffective assistance is not a finding of fact binding on this Court to the extent stated by 28 U.S.C. § 2254(d). "However, the findings made by the state court in deciding the claim are subject to the deference required by that statute." Nave v. Delo, 62 F.3d 1024, 1037 (8th Cir. 1995) (citing Strickland, 466 U.S. at 687), cert. denied sub nom Nave v. Bowersox, 517 U.S. 1214 (1996); see also Sloan, 54 F.3d at 1382 (ineffective assistance claims are mixed questions of law and fact; legal conclusions are reviewed de novo and state court findings of fact are presumed to be correct under 28 U.S.C. § 2254(d)).

> **Claim 10.B.: Trial counsel failed to object to the testimony of a prosecution witness that petitioner had admitted he was a "hit man" who had**

committed other murders.

In Claim 10.B, petitioner contends that trial counsel rendered ineffective assistance by failing to object to the testimony of Robert "Dutch" Tabler that petitioner had (1) admitted he was a hit man who had committed other murders, (2) related to Tabler the circumstances regarding an earlier contract murder he had performed, and (3) related to Tabler the size of the bullet holes in the victim's head after he was shot.

The Missouri Supreme Court addressed this claim as follows:

A.

> The first claim is that competent counsel would have objected to Tabler's testimony that Weaver was a "hit man" because such testimony was evidence of other crimes. No evidence was adduced on this point at the post-conviction hearing. Trial counsel, though called to testify, was not asked why she had failed to object. Had an objection been made, it would have been of no avail. Tabler's testimony was reporting a statement made by the defendant in the context of explaining Weaver's involvement in the murder of Taylor. Among other justifications for admitting evidence of other crimes is where such evidence is admissible to establish motive. *State v. Oxford*, 791 S.W.2d 396, 399 (Mo. banc 1990). Evidence that Weaver claimed to have been a killer for hire was relevant to establishing his motive for the murder of Taylor. While details of other murders may have been inadmissible, the evidence here was limited to what defendant told Tabler was his reason for involvement in this murder. Motive was a

legitimate issue in the case.

State v. Weaver, 912 S.W.2d at 518.

Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(2). See Linehan, 315 F.3d at 924.

The Missouri Supreme Court noted that no evidence was adduced on this claim at the postconviction hearing, and although trial counsel, Ms. Black, was called to testify, she was not asked why she failed to object to the challenged testimony. The Missouri Supreme Court concluded that any objection would have been futile, as evidence of other crimes is admissible under Missouri law to establish motive, evidence that petitioner was a killer for hire was relevant to establish his motive for Taylor's murder, and motive was a legitimate issue in the case. Implicit in the Missouri Supreme Court's discussion is that counsel did not fail to exercise the degree of skill and diligence that a reasonably competent attorney would exercise under similar circumstances.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. As stated above, the United States Supreme Court has clearly delineated the standard for ineffective assistance of counsel claims. In order to prevail on such a claim, petitioner must first demonstrate that his attorney failed to exercise the degree of skill and diligence that a reasonably competent attorney would exercise under similar circumstances. Strickland, 466 U.S. at 687. Petitioner must then demonstrate that he suffered prejudice as a result of his attorney's actions. Id.

A thorough review of the record supports the conclusion

that petitioner cannot establish his counsel's performance fell below acceptable standards. State law governs the admissibility of evidence in a state criminal proceeding. Clark, 16 F.3d at 963. The evidence was admissible under applicable Missouri law for the reasons stated by the Missouri Supreme Court. Petitioner therefore cannot establish the first prong of Strickland.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.B.

Claim 10.C.: Trial counsel failed to present evidence that the victim, Charles Taylor, always carried a gun.

In Claim 10.C., petitioner contends that trial counsel rendered ineffective assistance by failing to provide evidence that the victim, Taylor, had carried a gun for several years prior to his death, which would have contradicted the testimony of Juanita Taylor and Detective Leyshock who testified that Taylor had recently begun carrying a gun out of fear of Daryl Shurn.

This claim was not presented to the Missouri Supreme Court or to the postconviction motion court. As a result, this claim is procedurally defaulted and the Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750.

Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15. Therefore, dismissal of this claim is appropriate.

Moreover, if the Court were to reach the merits of the claim, it concludes that plaintiff cannot establish either ineffective assistance of counsel or resulting prejudice under Strickland. The evidence was that Taylor feared the Shurns, and as a result had recently started carrying a gun. Because petitioner denied knowing or ever having met Taylor, and denied any role in Taylor's death, whether Taylor carried a gun for a brief time or for years is irrelevant to petitioner's misidentification defense. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.C.

Claim 10.D.: Trial counsel failed to provide evidence and documents demonstrating the St. Louis County Prosecutor's Office's longstanding practice of striking blacks from jury venire panels.

In Claim 10.D., petitioner contends trial counsel rendered ineffective assistance by failing to provide evidence and documents to demonstrate that the state prosecutor's office had a longstanding practice of striking blacks from jury venire panels.

This claim was not presented to the Missouri Supreme Court or to the postconviction motion court. As a result, this claim is procedurally defaulted and the Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has

he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15. Therefore, dismissal of this claim is appropriate.

Moreover, in view of the Eighth Circuit's denial of petitioner's Batson claim in Weaver v. Bowersox, 241 F.3d 1024, even assuming counsel rendered ineffective assistance, petitioner cannot show he was prejudiced as a result. Strickland, 466 U.S. at 691.

Claims 10.E. and F.: Trial counsel failed to thoroughly question Officer Cantwell regarding officers' unsuccessful efforts to locate a gun at the scene of Taylor's death.

In Claims 10.E. and F., petitioner contends that trial counsel rendered ineffective assistance by failing to thoroughly question Police Officer Cantwell regarding the unsuccessful efforts the police had made to locate a gun at the scene of Taylor's death. Petitioner states that while trial counsel elicited from Cantwell that several officers had searched the area and at one point used metal detectors, this was inadequate. Petitioner states that in the trial of his co-defendant, Daryl Shurn, Cantwell testified that he and another officer thoroughly searched the area from the Mansion Hill Apartments to the area where petitioner was arrested. The following day, additional officers searched the entire area, and three days after the shooting, as many as ten police officers again searched the area. Thereafter, another team of officers again searched the area from the Mansion Hill Apartments to the area of petitioner's arrest, this time also using metal detectors.

The Missouri Supreme Court addressed this claim as follows:

E.

> Weaver next faults counsel for failing to bring out evidence regarding law enforcement's inadequate search for a gun. On that point, the motion court found that counsel's decision was not demonstrated to be prejudicial to the defendant's case under the *Strickland* standard. It might be added that failure to cross-examine a state's witness regarding how carefully a search was conducted was well within the range of permissible trial strategy where the primary thrust of the defense was misidentification.

State v. Weaver, 912 S.W.2d at 518.

The Missouri Supreme Court stated that the postconviction motion court found counsel's decision was not demonstrated to be prejudicial under Strickland, and added that failure to cross-examine a state's witness regarding how carefully a search was conducted was well within the range of permissible trial strategy where the primary thrust of the defense was misidentification.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell below acceptable standards with respect to this aspect of Cantwell's cross examination. Trial counsel elicited from Cantwell that no gun was found; this was consistent with petitioner's misidentification defense. Petitioner therefore cannot establish either prong of Strickland.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims 10.E. and F.

Claims 10.G and H: Trial counsel failed to object to Missouri Approved Instruction 25, concerning mitigating circumstances.

In Claims 10.G. and H., petitioner contends that trial counsel rendered ineffective assistance by failing to object to penalty phase jury instruction 25, which precludes the jury from considering a mitigating circumstance unless the jury unanimously finds that it exists.[9] Petitioner asserts that this

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[9]Instruction No. 25, which was based on Missouri Approved Instruction 3d 313.44 (eff. 1/1/87), states as follows:

> If you decide that one or more sufficient aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. 23, you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstances or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Charles Taylor.
>
> You may consider:
>
> 1. Whether defendant has no significant history of prior criminal activity.
>
> 2. Whether the defendant was an accomplice in the murder of Charles Taylor and whether his participation was relatively minor.

instruction is therefore directly contrary to the United States Supreme Court's decision in Mills v. Maryland, 486 U.S. 367 (1988) (finding unconstitutional jury instructions which led the jury to believe they could only return a verdict of life imprisonment if they unanimously agreed to specific facts they would consider to be mitigating). Petitioner contends that at

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> 3. Whether the defendant acted as an accomplice and was not the trigger man.
>
> 4. The defendant has two young children and has a mother in failing health.
>
> 5. Whether the defendant has worked with young people in encouraging them to stay out of trouble and avoid drugs.
>
> 6. Whether the defendant, after his incarceration, has worked with inmates in teaching them reading and language skills, and assists inmates with disabilities.
>
> 7. Whether the defendant, since his incarceration, has been given responsibilities of trustee, indicating traits of character showing cooperation, helpfulness and a willingness to work within the confines of authority.
>
> You may also consider any circumstances which you find from the evidence in mitigation of punishment.
>
> If you unanimously find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

Respondent's Ex. B. at 145.

minimum, trial counsel should have reviewed the Mills decision with the jury and told the jury that it need not unanimously agree on a mitigating circumstance in order to consider the mitigating circumstance.

Petitioner states that at the postconviction hearing, he provided an affidavit from juror Helen Bode which stated the jury first considered and found unanimously the aggravating circumstances which warranted death, and then began its consideration of mitigating circumstances. In the affidavit, Ms. Bode stated that the jury was not able to unanimously agree on each and every mitigating circumstance, and ultimately considered only those mitigating circumstances on which it unanimously agreed. See Supplemental Record, Affidavit of Helen Bode.

Testimony regarding the deliberative process and jurors' conduct during deliberations is inadmissible. See Federal Rule of Evidence 606(b); Bannister v. Armontrout, 4 F.3d 1434, 1444 n.15 (8th Cir. 1993), cert. denied, 513 U.S. 1103 (1995). After careful review of Ms. Bode's affidavit, the Court concludes the affidavit fits within the prohibition of Rule 606(b), Fed. R. Evid.[10] Petitioner cannot rely on juror Bode's

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[10]Rule 606 states in pertinent part:

> (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a jury may

statements in this habeas proceeding to impeach the jury's sentencing determination. Therefore, the Court will not consider the affidavit.[11]

The Missouri Supreme Court addressed this claim as follows:

B.

> Weaver claims counsel was ineffective in failing to object to the giving of MAI-CR3d 313.44 (effective 1-1-87). This Court has held that instruction, when followed by MAI-CR3d 313.46 (effective 1-1-87), is constitutional and does not violate *Mills v. Maryland*, 486 U.S. 367 (1988). *State v. Petary*, 790 S.W.2d 243, 245 (Mo. banc 1990). Here MAI-CR3d 313.46 was given and any tinge of unconstitutionality

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> testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Federal Rule of Evidence 1101(e) provides that the Federal Rules of Evidence apply to habeas corpus petitions filed in federal court under 28 U.S.C. § 2254.

[11]The postconviction motion court similarly refused to consider the Bode Affidavit. See Tr. of Post-Conviction Motion Hearing, Vol. 1, pp. 70-71.

removed.

State v. Weaver, 912 S.W.2d at 518.

The Missouri Supreme Court stated it has previously held that the instruction at issue, MAI- CR3d 313.44, is constitutional and does not violate the Mills holding when followed by MAI-CR3d 313.46 (eff. 1/1/87). See State v. Petary, 781 S.W.2d 534, 542-44 (Mo. 1989) (en banc), vacated and remanded, 494 U.S. 1075 (1990), reaff'd, 790 S.W.2d 243 (Mo.) (en banc), cert. denied, 498 U.S. 973 (1990). In the instant case, MAI-CR3d 313.46 was given.[12] Implicit in the Missouri Supreme Court's ruling is that trial counsel was not ineffective for failing to object to a proper instruction.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. The Eighth Circuit has found consistently that identical portions of substantially similar jury instructions on mitigating circumstances did not violate Mills.

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[12]Instruction No. 26 was taken from MAI-CR3d 314.46. The instruction stated:

> You are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

Respondent's Ex. B, p. 146.

See McDonald v. Bowersox, 101 F.3d 588, 599-600 (8th Cir. 1996), cert. denied, 521 U.S. 588 (1997); Reese v. Delo, 94 F.3d 1177, 1186 (8th Cir. 1996), cert. denied, 520 U.S. 1257 (1997); Murray v. Delo, 34 F.3d 1367, 1381 (8th Cir. 1994), cert. denied, 515 U.S. 1136 (1995); Battle v. Delo, 19 F.3d 1547, 1561-62 (8th Cir. 1994) (instruction does not violate the Constitution because it does not "lead the jury to the inescapable conclusion that it must unanimously agree that there [are] mitigating circumstances before it [can] fix life in prison as [petitioner's] punishment."), on reh'g, 64 F.3d 347 (8th Cir. 1995), cert. denied, 517 U.S. 1235 (1996).

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims 10.G. and H.

Claim 10.I.: Trial counsel failed to provide evidence that petitioner had previously been shot while working as a disc jockey.

In Claim 10.I., petitioner contends that trial counsel rendered ineffective assistance by failing to provide to the jury evidence that petitioner had been shot previously while working as a disc jockey. Petitioner asserts that the prosecutor improperly elicited testimony from several of petitioner's character witnesses as to whether they were aware petitioner had been shot. Trial counsel objected to the relevance of the questions, but if counsel had investigated petitioner's background, she would have learned he was shot while working as a disc jockey, which would have directly rebutted the State's position that petitioner was wounded as a result of being a hit man.

The Missouri Supreme Court addressed this claim as follows:

C.

> Weaver claims trial counsel was ineffective for failing to object to the prosecutor's inquiries regarding bullet holes in Weaver's body and for failing to present evidence that Weaver "was the victim of someone dissatisfied with his work" as a disc jockey. This claim was not preserved in the post-conviction relief motion and is deemed waived.

State v. Weaver, 912 S.W.2d at 518.

The Missouri Supreme Court found this claim was waived because it was not presented to the postconviction motion court. The state court's opinion therefore rests on an adequate and independent state procedural ground. It is well established that federal habeas courts are barred from reviewing claims decided on adequate and independent state grounds. See Coleman, 501 U.S. at 729-30. This Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15 (1995). Therefore, dismissal of this claim is appropriate based on procedural default.

Moreover, even if this Court were to review the merits of petitioner's claim, it would conclude petitioner has failed to establish either that counsel rendered ineffective assistance, or that he was prejudiced as a result. Strickland, 466 U.S. at 691. A careful review of the record shows that no witness testified he

or she was aware petitioner had been shot; the issue was alluded to only by the prosecutor's questions in cross-examining three of petitioner's numerous witnesses. Tr. on Appeal, Vol. III, pp. 1179, 1183, 1205. On one occasion, trial counsel objected on relevancy grounds to the State's question whether the witness knew if petitioner had been shot, and the objection was overruled. There was no evidence presented that petitioner had been shot, and the State did not argue in closing that petitioner had been shot or that this tended to show he was a hit man. Petitioner has not demonstrated that his counsel's alleged failure to investigate and present evidence rose to the level of constitutionally ineffective assistance of counsel, or that he was prejudiced as a result. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.I.

Claim 10.J.: Trial counsel failed to seek a change of venue due to pretrial publicity regarding Taylor's death and his involvement as a potential witness in the federal prosecution of a drug dealer named Ricky Durham.

In Claim 10.J., petitioner contends that trial counsel rendered ineffective assistance by failing to seek a change of venue due to pretrial publicity regarding Taylor's death and his involvement as a potential witness in the federal prosecution of a drug dealer named Ricky Durham. Petitioner asserts that shortly before trial, the St. Louis Post-Dispatch newspaper published an article related to witness intimidation which focused on the facts and circumstances of Taylor's death. Petitioner also asserts that local media, both print and television, provided substantial coverage during the March 1988 trial of his co-defendant, Daryl Shurn, and immediately prior to petitioner's trial there were additional news reports and stories regarding shootings and witness intimidation. Petitioner asserts that his trial counsel failed to adequately voir dire the

jury on the effects of this pretrial publicity, and failed to seek a change of venue based thereon.

The Missouri Supreme Court addressed this claim as follows:

D.

> Weaver next complains that counsel failed to seek a change of venue due to pretrial publicity. The trial court found that the voir dire record adequately covers that potential problem and that no prejudice resulted under *Strickland* by counsel's failure to seek a change of venue. The record supports that finding.

State v. Weaver, 912 S.W.2d at 518.

The Missouri Supreme Court stated that the trial court found the voir dire record adequately covered the potential problem of jury exposure to pretrial publicity, and that under Strickland no prejudice accrued to petitioner as a result of trial counsel's failure to seek a change of venue. The Missouri Supreme Court found that the record before it supported the trial court's finding.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. "Due process requires that the accused receive a trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); Pruett v. Norris, 153 F.3d 579, 584 (8th Cir. 1998). There is no presumption of prejudice from pretrial publicity, however, unless the petitioner establishes that the publicity "was so extensive and corrupting that a reviewing court is required to 'presume unfairness of constitutional magnitude.'" Pruett, 153 F.3d at 585 (quoting Dobbert v. Florida, 432 U.S. 282, 303

(1977)); see Snell v. Lockhart, 14 F.3d 1289, 1293 (8th Cir.), cert. denied sub nom Snell v. Norris, 513 U.S. 960 (1994). A presumption of pretrial publicity is "rarely applicable, being reserved for extreme situations." Snell, id. Cases in which the presumption has applied were found to be exceptional "not because of the amount of publicity but rather because of the 'circus atmosphere' of the trial proceedings themselves." Id. Nothing in the record suggests that petitioner's trial was anything other than orderly. Petitioner has not presented evidence in this case which would warrant a presumption of prejudice.

Thus, in order to obtain habeas relief, petitioner would have to demonstrate actual prejudice. Murphy, 421 U.S. at 800; Pruett, 153 F.3d at 587. "In making this assessment, a court looks to 'indications in the totality of the circumstances' to determine if any inference of juror partiality rendered the trial fundamentally unfair." Pruett, 153 F.3d at 587 (quoting Murphy, 421 U.S. at 799). "The relevant question is whether the jurors actually seated 'had such fixed opinions that they could not judge impartially the guilt of the defendant.'" Id. (quoting Patton v. Yount, 467 U.S. 1025, 1035 (1984)). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961).

A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell below acceptable standards in failing to seek a change of venue, because there is no evidence of juror partiality, and consequently no prejudice. The great majority of the venire members had heard nothing about the matter in the press. Some venire members had heard about the matter but had no specific recollections of media reports, and a few had heard about the matter but stated they could put aside what they had heard and consider only the evidence presented at trial.

Petitioner has not shown that pretrial publicity made the public in general or the venirepanel in particular prejudiced against him. The voir dire does not demonstrate that there was a great deal of publicity in this case, based on the relatively few panel members who had heard anything about the matter. Cf. Swindler v. Lockhart, 885 F.2d 1342, 1348 (8th Cir. 1989) (petitioner's constitutional rights not violated where the trial court denied motion to change venue although 98 out of the 120 venire persons had some knowledge of the case) (citing cases), cert. denied, 495 U.S. 911 (1990); Leisure v. Bowersox, 990 F. Supp. 769, 796-97 (E.D. Mo. 1998) (same, where approximately 95 percent of prospective jurors had heard something about the case). Nothing in the record of this case shows "such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside." Murphy v. Florida, 421 U.S. 794, 800 (1975). Petitioner therefore cannot establish prejudice under Strickland.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.J.

Claims 10.K. and L.: Trial counsel failed to object to Police Officers Lee and Cantwell's opinions regarding why gunshot residue was not found on petitioner's hands immediately after his arrest, and failed to call a highway patrol chemist to rebut this testimony.

Petitioner argues that trial counsel rendered ineffective assistance by failing to object to Officers Lee and Cantwell's opinions regarding why gunshot residue was not found on petitioner's hands immediately after his arrest, and by failing to call Missouri Highway Patrol chemist Carl Rothove to rebut this testimony. Petitioner asserts that Lee and Cantwell testified gunshot residue would not have been found on petitioner's hands at the time of arrest because more than one hour had elapsed since the shooting, and perspiration on petitioner's hands at the time of arrest would have negated any possibility of identifying gunshot residue through available tests. Petitioner asserts that Lee and Cantwell's testimony constituted expert testimony, and counsel was ineffective in failing to object to their testimony on the grounds that they were not qualified as experts to provide the testimony, and in failing to voir dire either witness as to his expert qualifications.

Petitioner asserts that trial counsel should have called Highway Patrol chemist Rothove as a witness at trial to rebut Lee and Cantwell's testimony. Petitioner states Rothove testified at the Rule 29.15 proceeding that the likelihood of finding gunshot residue increases with the number of shots fired, that a revolver deposits more residue than a semi-automatic or autoloading gun, that a .357 caliber gun tends to leave substantial residue deposits, and that meaningful residue results can be obtained for up to six hours after a person has fired a gun.

The Missouri Supreme Court addressed these claims as follows:

E.

> Weaver next faults counsel for failing to bring out evidence regarding law enforcement's inadequate search for a gun. On that point, the motion court found that counsel's decision was

not demonstrated to be prejudicial to the defendant's case under the *Strickland* standard. It might be added that failure to cross-examine a state's witness regarding how carefully a search was conducted was well within the range of permissible trial strategy where the primary thrust of the defense was misidentification.

F.

Weaver argues that counsel was ineffective in failing to object to a police officer's testimony about a lack of gunshot residue on Weaver's hands and counsel's failure to call a highway patrol chemist. The question by the state was prompted by defense counsel's questioning regarding gunshot residue tests and the negative results of those tests. It was appropriate on redirect to ask the officers if they had any explanation for the lack of the gunshot residue. No evidence was offered at the post-conviction relief hearing that the officers were not qualified to explain what factors might reduce the possibility of finding residue. Counsel is not ineffective for failing to make an objection unless it is apparent that the objection would have been meritorious. *Six*, 805 S.W.2d at 168.

The police officers testified that, based on their experience, passage of time between firing and the time of taking the tests (in this case, four to five hours) and perspiration and the wiping of hands can cause gunshot residue to dissipate. The chemist did not directly refute those statements but testified only that the number of shots fired increases the chance of finding residue, that it is possible to find residue for up

> to six hours, although residue is more likely found within one and one-half hours, and that the chemist had no opinion regarding the effect of perspiration. The chemist's testimony would not have established any defense but, at most, would have marginally impeached the testimony of the police officers regarding the absence of gunshot residue. It cannot be said that counsel's alleged failure undermines confidence in the outcome of the trial. Thus, Weaver has failed to establish the prejudice prong of the *Strickland* requirement.

State v. Weaver, 912 S.W.2d at 518-19.

The Missouri Supreme Court observed that the State's questions concerning the lack of gunshot residue were prompted by defense counsel's questioning regarding gunshot residue tests and the negative results of those tests and found that it was appropriate for the State to ask the officers on redirect examination if they had any explanation for the negative test results. The Court stated no evidence was offered at the postconviction relief hearing that the officers were not qualified to explain what factors might reduce the possibility of finding gunshot residue, and that counsel is not ineffective for failing to object unless it is apparent the objection would have been meritorious.

The Missouri Supreme Court stated the officers testified based on their experience that gunshot residue can dissipate because of the passage of time between firing a gun and taking a gunshot residue test (in this case, four to five hours), as well as because of perspiration and the wiping of hands. The Court stated that the chemist, Rothove, did not directly refute those statements but testified only that (1) the number of shots fired increases the chance of finding residue, (2) it is possible to find residue for up to six hours, although residue is more likely

found within one and one-half hours, and (3) he had no opinion regarding the effect of perspiration. The Court concluded the chemist's testimony would not have established a defense, and at most, would have "marginally impeached" the testimony of Lee and Cantwell. The Missouri Supreme Court concluded that counsel's alleged failure did not undermine confidence in the outcome of the trial, and therefore the prejudice prong of Strickland was not established.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. As stated above, the United States Supreme Court has clearly delineated the standard for ineffective assistance of counsel claims in Strickland, 466 U.S. at 687. A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell below acceptable standards. This Court concurs with the Missouri Supreme Court's description of Lee and Cantwell's testimony, its evaluation of the content and probative value of Rothove's testimony,[13] and its conclusion that counsel's alleged failure did not undermine confidence in the outcome of the trial. Thus, there can be no prejudice under the Strickland analysis.

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[13]This Court's review of Rothove's testimony shows that he stated the greatest likelihood of obtaining positive gunshot residue test results occurs within the first two hours after firing, as there is a "fairly dramatic decrease in the residue levels" after two hours. Tr. on Appeal, PCR Hearing, Vol. 1, pp. 28-29. Rothove also testified that his lab does not run tests on samples taken more than six hours after firing, because the results would not be "meaningful." Id. at 28. Although Rothove's testimony is slightly different than as described by the Missouri Supreme Court, the difference does not change the analysis or the result.

Petitioner has not established that the Missouri Supreme Court's decision with respect to these issues resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims 10.K. and L.

Claim 10.M.: Trial counsel failed to adequately cross-examine Officer Cantwell regarding his trial testimony that he did not request gunpowder residue testing of the clothes petitioner was wearing at the time of his arrest.

Petitioner argues that trial counsel rendered ineffective assistance by failing to adequately cross-examine Officer Cantwell regarding his trial testimony that he did not request gunpowder residue testing of the clothes petitioner was wearing at the time of his arrest. Petitioner states that trial counsel had received information prior to trial that Cantwell had, in fact, requested gunpowder residue testing of petitioner's clothing. Petitioner asserts this area of inquiry could have provided impeachment of Officer Cantwell.

The Missouri Supreme Court addressed this claim as follows:

G.

As to the claim that counsel should have more extensively cross-examined one of the officers about the gunshot residue evidence, the motion

> court found that there was no evidence to support this ground presented at the evidentiary hearing. Having failed to present evidence about what more extensive cross-examination would have disclosed, the claim was properly denied.

State v. Weaver, 912 S.W.2d at 519.

The Missouri Supreme Court stated that petitioner did not present evidence to support this claim at the evidentiary hearing on postconviction relief. The state court stated that because petitioner failed to present evidence about what more extensive cross-examination would have disclosed, the claim was properly denied.

A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell below acceptable standards, as there is no evidence what additional cross-examination of Cantwell would have produced. This Court agrees with the Missouri Supreme Court's conclusion that without such evidence, there can be no proof that trial counsel's performance was below acceptable levels, or that any prejudice resulted.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.M.

Claim 10.N.: Trial counsel failed to object to evidence and argument intended by the prosecutor to explain why no gunpowder residue was found on petitioner.

Petitioner argues that trial counsel rendered ineffective assistance by failing to object to evidence and argument intended by the prosecutor to explain why no gunpowder residue was found on petitioner. Petitioner states this argument was based on Officer Lee and Cantwell's testimony "under the guise of expert testimony," and the gunpowder residue tests ordered by Cantwell. Petitioner asserts that evidence was available to trial counsel, including the testimony of Missouri Highway Patrol chemist Carl Rothove, concerning residue specimen testing and "other factors related to the possible type of weapon involved in the shooting, caliber, length of time between the shooting, and forensic examination of the perpetrator." First Amended Petition for Writ of Habeas Corpus, ¶ N, p. 27.

The Missouri Supreme Court addressed this claim as follows:

H.

Weaver claims that counsel should have objected to the evidence and argument of the prosecutor as to why no gunpowder residue was found on him. The evidence pointed to in support of this argument was that of the chemist, who indicated that "very little data was provided" by the officers responsible for obtaining the residue tests as to when the tests were performed or the type of weapon. From this, Weaver argues that counsel should have presented evidence demonstrating that the absent data precluded the state's explanation for

> the absent residue. As noted above, the additional information about when the residue tests were performed and the type of weapon were not shown to undermine the officers' explanation. Counsel's failure to present evidence which would have been purely impeachment on a collateral matter of the officers' lack of attention to detail in reporting data to the chemist is clearly within the range of conduct by competent counsel. Weaver also fails to establish prejudice on this point.

State v. Weaver, 912 S.W.2d at 519.

The Missouri Supreme Court stated that petitioner supported this claim with Rothove's testimony at the postconviction relief hearing. Rothove testified that "very little data was provided" to his lab by the officers responsible for obtaining the gunpowder residue tests, as to when the tests were performed in relation to the time of shooting, or as to the type of weapon. Tr. on Appeal, PCR Hearing, Vol. I, p. 30. The Missouri Supreme Court stated that as it previously discussed with respect to related claims 10.K. and 10.L. (10.E. and F. in the Missouri Supreme Court's opinion), the additional information about when the residue tests were performed and the type of weapon were not shown to undermine Lee and Cantwell's testimony. The Missouri Supreme Court concluded that counsel's failure to present evidence on what would have been impeachment on a collateral matter, i.e., the officers' lack of attention to detail in reporting data to the chemist, was clearly within the range of conduct by competent counsel. State v. Weaver, 912 S.W.2d at 519. The Missouri Supreme Court also concluded that petitioner failed to establish prejudice on this claim. Id.

A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell

below acceptable standards, as it has not been established that Lee and Cantwell's testimony should not have been admitted, and the Rothove testimony does not significantly undermine Lee and Cantwell's testimony. Thus, the prosecutor could introduce Lee and Cantwell's testimony, and then use the same as a basis for argument as to why there was no gunpowder residue found on petitioner. Trial counsel will not be found ineffective for failing to object to admissible evidence or argument. The Court also agrees with the Missouri Supreme Court's conclusion that no prejudice was shown.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.N.

Claim 10.O.: Trial counsel failed to correct a prejudicial statement made by one of the jurors during voir dire, that life imprisonment is more costly than the death penalty.

Petitioner argues that trial counsel rendered ineffective assistance during voir dire by failing to correct a prejudicial statement made by one of the jurors, Reis, that life imprisonment is more costly than the death penalty. Petitioner states that this misperception and prejudicial statement was conveyed to three other members of the jury, McGrath, Taylor and Kohler, who were consequently misled in considering the punishment phase evidence and appropriateness of the death

penalty. Petitioner states that information, statistics and evidence available to trial counsel would have clearly shown it is not less costly to impose the death penalty as opposed to a sentence of life imprisonment.

The Missouri Supreme Court addressed this claim as fo"ows:

I.

> Weaver complains that his defense counsel should have put on evidence to correct one member of the venire panel who, in response to a question on voir dire about her feelings regarding the death penalty, said,
>
> > I really haven't considered it in particular cases, but just as a fact of economics of the State keeping people for life and the cost and I would think that crime would go down if the death penalty were enforced more. So I haven't really thought about it in specific cases and thought that people should get it or not.
>
> Even though made in the presence of other jurors, the isolated response did not so permeate the trial that those jurors hearing it would be unlikely to follow the instructions. The economic cost of impose a death sentence is irrelevant to any issue submitted to the jury. Counsel cannot be faulted to failing to present irrelevant evidence. Neither error nor prejudice have been demonstrated. The claim is denied.

State v. Weaver, 912 S.W.2d at 519.

The Missouri Supreme Court stated that the juror's statement was "isolated" and "did not so permeate" the trial that the other jurors who heard it were likely to disregard the instructions given them with respect to issues of punishment. The Missouri Supreme Court also stated that the economic cost of imposing the death penalty is irrelevant to any issue submitted to the jury, and that counsel will not be faulted for failing to present irrelevant evidence.

A thorough review of the record supports the conclusion that the juror's statement was an isolated occurrence. The Eighth Circuit has strongly condemned as improper and prejudicial prosecutors' arguments that a jury should select the death penalty for economic reasons. See, e.g., Miller v. Lockhart, 65 F.3d 676, 682-83 (8th Cir. 1995) (due process violation occurred where, inter alia, prosecutor referred to "tremendous burden" life imprisonment for defendant would "put on the taxpayers" and implied that death penalty would cost less; argument injected irrelevant and prejudicial issue); Antwine, 54 F.3d at 1363-64 (closing argument improper and prejudicial where it referred to taxpayers' burden to pay for life imprisonment). Nonetheless, the Eighth Circuit found no due process violation where a prosecutor made a single, brief comment concerning the cost of life imprisonment, in the midst of a "tough, hard-hitting argument . . . based on the hard facts presented." Blair v. Armontrout, 916 F.2d 1310, 1324 (8th Cir. 1990), cert. denied, 502 U.S. 825 (1991) (one isolated though highly improper comment was not sufficiently prejudicial to render sentencing hearing unfair).

The parties have not cited any authority addressing the effect of this type of statement made by a juror, and the Court has found none. The Court concludes that because a prosecutor's isolated statement in closing argument concerning the economic cost of death was not found to render the

proceeding unfair, the same result must occur where the isolated statement is made by a juror during voir dire. Several factors compel this result: there was a significant time span between the juror's statement and the sentencing proceedings; only three other jurors heard the statement; a juror's statement during voir dire cannot be considered as influential or potentially prejudicial as a prosecutor's argument during sentencing proceedings, because the prosecutor represents the authority of the state; and the jurors were properly instructed on factors relevant to determining punishment, and are presumed to have followed the instructions given them. For these reasons, even assuming trial counsel should have objected to the juror's statement, no prejudice was shown.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.O.

Claim 10.P.: Trial counsel failed to impeach Dr. Turgeon regarding his testimony that no bullet fragments were recovered from Taylor's body.

Petitioner argues that trial counsel rendered ineffective assistance by failing to impeach Dr. Turgeon of the St. Louis County Medical Examiner's Office regarding his testimony that no bullet fragments were recovered from the victim during the autopsy. Petitioner asserts that this ground of impeachment would have severely undermined Dr. Turgeon's credibility, and

would have clearly rebutted the prosecution's argument that Taylor was the victim of a contract murder.

The Missouri Supreme Court addressed this claim as follows:

J.

> Weaver argues that counsel failed to impeach a physician's testimony that no bullet fragments were recovered from the victim's body by the testimony of two police officers that bullet fragments were recovered following the autopsy. In this case, there was virtually no dispute but that the victim died of six traumatic gunshot wounds to the head. The presence or absence of fragments was not necessary to establish the cause of death. The failure of counsel to present impeachment evidence regarding the matter of the recovery of bullet fragments is not prejudicial.

State v. Weaver, 912 S.W.2d at 519.

A review of the record supports both the Missouri Supreme Court's factual findings and its conclusions of law. There was no dispute as to the cause of death, and as petitioner asserted he had nothing to do with the killing, this evidence was irrelevant to his defense. Petitioner has not shown either that counsel's performance fell below acceptable standards or resulting prejudice.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at

924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.P.

Claim 10.Q.: Trial counsel failed to present ballistic evidence which would have suggested that more than one weapon was used in Taylor's killing.

Petitioner argues that trial counsel rendered ineffective assistance by failing to present ballistic evidence which would have suggested that more than one weapon was employed in Taylor's killing. Petitioner points to the testimony of Officer Crosswhite at the Rule 29.15 hearing, that he concluded the three bullets submitted to him for analysis were fired by the same type of revolver, but the evidence was inconclusive as to whether the bullets were fired by the same gun or what the caliber of the gun was. Petitioner asserts this testimony would have successfully impeached the testimony of several witnesses, although petitioner does not identify who these witnesses are, and would have supported petitioner's defense.

The Missouri Supreme Court addressed this claim as follows:

K.

Finally, Weaver challenges counsel's failure to present ballistics evidence showing more than one weapon was used. The evidence presented at the post-conviction hearing showed that the evidence on this point was inconclusive as to whether more than one weapon had been used. The motion court correctly found no prejudice

> in failing to present that evidence. In addition, the jury could have found that both Shurn and defendant had fired shots. The possibility that two guns might have been used was consistent with the state's case and would have done nothing to advance defendant's misidentification defense. This point is without merit.

State v. Weaver, 912 S.W.2d at 519-20.

A review of the record supports both the Missouri Supreme Court's factual findings and its conclusions of law. Officer Crosswhite testified that he was given fourteen bullet fragments from the Taylor killing to examine. Tr. on Appeal, PCR Hearing, Vol. II, pp. 270-71. Of these, he concluded that three were positively fired by the same type of revolver, probably a .38 or .357 Magnum, and the rest of the bullet evidence was inconclusive, meaning that it may or may not have been fired by the same firearm. Id. at 271-72. As the state court concluded, the possibility that two guns were used would not harm the state's case, and could not help petitioner's, which was based solely on misidentification. Because petitioner asserted he had nothing to do with the killing, this evidence was irrelevant to his defense. Petitioner has not shown that counsel's performance fell below acceptable standards or that prejudice resulted.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore,

petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.Q.

K. Claim Eleven - Supplemental 29.15 Motion.

Petitioner asserts as his eleventh claim for relief that the state postconviction motion court refused to consider the claims petitioner presented in an untimely supplemental Rule 29.15 motion, and that this refusal violated his rights under the Fifth, Eighth and Fourteenth Amendments. Petitioner states that the supplemental motion contained allegations that trial counsel was ineffective for (1) failing to object to the constitutionality of certain guilt and penalty phase instructions, and (2) failing to inspect the contents of the victim's briefcase prior to trial. Petitioner asserts that by arbitrarily enforcing the Rule 29.15 time limits, the postconviction motion court denied him the opportunity to present violations of his constitutional rights. Petitioner also asserts that the time limits of Rule 29.15 fail to account for the nature and complexity of Rule 29.15 actions, particularly in death penalty cases.

The Missouri Supreme Court addressed this claim as follows:

> In his eleventh point, Weaver argues that he should have been permitted to file a supplemental Rule 29.15 motion after the time for filing amendments to such motion had run. The only authority cited for that proposition is *State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994). In *Chambers* this Court observed that trial counsel's conduct was not ineffective in failing to object to an instruction. *Chambers* did not overrule the fundamental principle that the time limits for filing and amending pleadings under Rule 29.15 are valid and mandatory and the trial court is without authority to give

> additional time beyond that provided by Rule 29.15(f). *State v. Six*, 805 S.W.2d 159, 170 (Mo. banc 1991), *cert. denied*, 502 U.S. 871 (1991); *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). The motion court did not err in failing to permit a supplemental amended Rule 29.15 motion.

State v. Weaver, 912 S.W.2d at 520.

The Missouri Supreme Court's decision rested on the basis of a procedural default. "[A] procedural default under state law may constitute independent and adequate state law grounds precluding federal review." Oxford v. Delo, 59 F.3d 741, 744 (8th Cir. 1995) (citing Harris v. Reed, 489 U.S. 255, 262 (1989)), cert. denied sub nom Oxford v. Bowersox, 517 U.S. 1124 (1996). The Eighth Circuit has held that Rule 29.15 is both firmly established and regularly followed, and therefore is an adequate state ground to bar federal review. Malone v. Vasquez, 138 F.3d 711, 717 (8th Cir.) (verification requirements), cert. denied, 525 U.S. 953 (1998); see Sloan v. Delo, 54 F.3d at 1379-81 (time limit procedures under Rule 29.15 adequate).

The Missouri Supreme Court's decision on this issue therefore rests on adequate and independent state law grounds. It is well established that federal habeas courts are barred from reviewing claims decided on adequate and independent state law grounds. See Coleman, 501 U.S. at 729-30. Because the Missouri Supreme Court relied on adequate and independent state law grounds, this Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup v. Delo, 513 U.S.

298, 314-15 (1995). Therefore, dismissal of this claim is appropriate.

L. Claim Twelve - Inadmissible Identifications.

Petitioner asserts as his twelfth claim for relief that his conviction and sentence of death were imposed in violation of the Fifth, Sixth and Fourteenth Amendments because testimony and evidence were admitted at trial regarding unduly suggestive lineup and show-up identifications held after petitioner' arrest.

1. Lineup Identification.

Christine Coslick and Robert Mackin testified at trial regarding their identification of petitioner in a lineup after his arrest. Coslick testified that on the morning of the shooting, she looked out her apartment window and saw a black male later identified as the victim being chased by two other black males through the grounds of the Mansion Hills apartments. One of the two pursuing males was wearing a maroon shirt. Coslick heard three or four shots. Coslick saw the two black males run back up toward the apartments, and then lost sight of them. Shortly thereafter, a car came around the road with the two men in it. She saw one of the men go back into the woods. She heard more shots, and then the man returned to the car and she saw the vehicle leave. Later that day, Coslick selected petitioner from a line-up, based on her recollection of the build and stature of the person she had seen, as well as her recollection of his shirt.

Robert Mackin testified he heard shots on the day of the killing, and looked out his window to see two men walking away from a wooded area, one of whom was wearing a dark red outfit. He lost sight of the men, and then saw a car come down from the upper parking lot. The passenger got out, and Mackin testified he was wearing the same dark red outfit. This man

walked back to the wooded area and Mackin heard more shots. Later that evening, Mackin selected petitioner from a lineup based on his clothing.

Petitioner asserts the lineup was unduly suggestive because it was comprised of several individuals but petitioner was the only one wearing red clothing. The others wore blue and white clothing. Petitioner also asserts that in addition to the unduly suggestively nature of the lineup, it occurred nearly twelve hours after the shooting. Petitioner states that neither Coslick nor Mackin testified they were able to clearly see any of the individuals they observed the day of the shooting, and their selection of petitioner was based on petitioner's general build, statute and color of clothing, which was similar to the individual they had seen earlier.

2. Show Up Identification.

Petitioner also asserts that the "show up" identification which was introduced into evidence at trial was unduly suggestive and unreliable. Petitioner states that the first police officer who responded to the scene of the shooting was Officer Gardiner. Upon arriving at the location of the shooting, Officer Gardiner saw a car similar to that described as being the getaway vehicle for the persons involved in the shooting. Officer Gardiner pursued the car onto Interstate 70 until it was involved in an accident, and both occupants ran from the car in opposite directions. Officer Gardiner pursued and apprehended one of the individuals, later identified as Daryl Shurn. Officer Gardiner and Shurn returned to the car. Later, petitioner, who had been arrested some distance away, was brought to the scene of the car accident for identification by Officer Gardiner. Petitioner states that even though Officer Gardiner testified he was never able to clearly view the second occupant of the vehicle, as a result of the unduly suggestive nature of the show up identification, he was able to state that petitioner was the other individual in the vehicle.

The Missouri Supreme Court addressed these issues as follows:

> Christine Coslick testified that on July 6, 1987, at about 7:45 a.m., while watching from her apartment in the Mansion Hills apartment complex, she saw a black male being chased by two other black males down a nearby hill into a wooded area. One of those giving chase was wearing a maroon shirt. She heard shots from the wooded area, saw the two black males return to the car and then saw the one in the maroon shirt go back to the woods. She heard additional shots, saw the man in the maroon shirt return to the car and then observed the vehicle leave. The man in the maroon shirt came within fifty years of Coslick. Later that same day, she viewed a lineup. At the lineup, Coslick remembered not only the shirt but the general build of the individual. The person she identified was defendant.
>
> Witness Robert Mackin testified that on the same date at the same time he was laying in bed in his apartment and heard shots. Upon going to the window, he saw two men walking briskly away from the wooded area, one of whom appeared to be in a "dark red outfit." This individual went back to the car then returned to the wooded area where Mackin heard three more gunshots. That day Mackin was taken to a lineup where the picked out the defendant based on statute and clothing.
>
> Weaver argues that because he was the only person in the lineup wearing maroon or red clothing, the trial court should have suppressed the identification. In order to succeed on this

claim, he must carry a burden of proof that there was a "very substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).

Lineups have been held not to be impermissibly suggestive merely because of the color or characteristics of the clothing of persons in the lineup. *State v. Tringl*, 848 S.W.2d 29, 32 (Mo.App. 1993); *State v. Morant*, 758 S.W.2d 110, 117 (Mo.App. 1988); *State v. Howard*, 699 S.W.2d 58, 59 (Mo.App. 1985). The rule seems to be that a lineup will be impermissibly suggestive only if the clothing is the sole basis for identification.

The linchpin of due process in identification procedures is reliability, not suggestiveness. *Manson*, 432 U.S. at 114. Here the witnesses relied not only on the color of clothing but of [sic] defendant's general build and appearance. Both witnesses had an opportunity to view Weaver at the time of the crime. Both witnesses' attention had been turned to Weaver because of the gunshots. Their identification of Weaver was consistent with their description. Both witnesses expressed a rather high level of certainty at the confrontation. The confrontation occurred the same day as the shooting. Under the totality of the circumstances, their identification has sufficient indicia of reliability. *See State v. Hornbuckle*, 769 S.W.2d 89, 93 (Mo. banc 1989). It is true that in the case of both witnesses, identification was based largely on general build and clothing. However, it cannot be said on the record here that a "very substantial likelihood of irreparable

misidentification" occurred. Short of such evidence, courts rely on the good sense and judgment of jurors for determining the trustworthiness of the identification.

> Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature . . . . The defect, if there be one, goes to weight and not to substance.

Manson, 432 U.S. at 117.

Weaver further complains about the identification of defendant near the scene where he was arrested by the officer who pursued the vehicle in which defendant was riding. After defendant was arrested, he was brought back to the crime scene. He now argues that this procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

To repeat, the linchpin of due process in identification procedures is reliability rather than suggestiveness. The reliability of identification is greatly enhanced by returning a freshly apprehended suspect to the scene of an offense for prompt identification by eyewitnesses. *State v. Pettit*, 719 S.W.2d 474, 477 (Mo.App. 1986), *see also State v. Jackson*, 477 S.W.2d 47, 51-52 (Mo. 1972). The identification by the pursuing officer at the scene was not impermissibly suggestive or unreliable.

Weaver, 912 S.W.2d at 520-21.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. The United States Supreme Court clearly delineated a two-part standard for evaluating identification testimony in Manson v. Brathwaite, 432 U.S. 98 (1977). A court must consider (1) whether the identification procedures were impermissibly suggestive; and (2) if they were impermissibly suggestive, whether under the totality of the circumstances "the suggestive procedures created a 'very substantial likelihood of irreparable misidentification.'" Manson, 432 U.S. at 116-17; see also United States v. Fields, 167 F.3d 1189, 1190 (8th Cir.) (describing the analysis required under Manson), cert. denied, 526 U.S. 1140 (1999). The Supreme Court stated that "reliability is the linchpin in determining the admissibility of identification testimony" and identified five factors to guide courts in assessing the reliability of pretrial identifications: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the

confrontation." Manson, 423 U.S. at 114.

The Missouri Supreme Court properly applied the law set forth in Manson to conclude that the identification testimony in this case did not violate petitioner's due process rights. Citing its decision in State v. Hornbuckle, 769 S.W.2d 89, 93 (Mo. 1989) (en banc), the state supreme court evaluated the record using the five factors set forth in Manson for determining the reliability of identification testimony. The state court determined the lineup was not impermissibly suggestive because clothing was not the sole basis for identification. Weaver, 912 S.W.2d at 520. The state court then proceeded to second part of the analysis, to determine whether under the totality of the circumstances, the suggestive procedures created a "very substantial likelihood of irreparable misidentification." Id. (quoting Manson, 432 U.S. at 116).

With respect to the lineup identifications, the Missouri Supreme Court observed that (1) the witnesses relied not only on the color of clothing but also on petitioner's general build and appearance; (2) both witnesses had an opportunity to view petitioner at the time of the crime, although from a distance; (3) both witnesses' attention had been turned to petitioner because of hearing the gunshots; (4) the witnesses' identification of petitioner was consistent with their description; (5) both witnesses expressed a rather high level of certainty at the confrontation; and (6) the confrontation occurred the same day as the shooting. Examining the totality of the circumstances, the Missouri Supreme Court concluded the lineup identification testimony had sufficient indicia of reliability, and the suggestive circumstances did not create a very substantial likelihood of irreparable misidentification.[14] Weaver, 912 S.W.2d at 520-21.

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[14]A careful review of the record shows that the trial court limited Mackin and Coslick's testimony to whether the clothing and physical stature of the men they identified from the

With respect to the show up identification, the Missouri Supreme Court stated that the reliability of Officer Gardiner's identification of petitioner was "greatly enhanced by returning a freshly apprehended suspect to the scene," and concluded the identification was neither impermissibly suggestive nor unreliable. The record indicates Officer Gardiner testified that after Daryl Shurn's car hit other vehicles and was coming a halt, the passenger got out from the back seat and Gardiner "had quite a bit of time to look at him." Tr. on Appeal, Vol. II, p. 745. Officer Gardiner began getting out of his police car, pointed a shotgun at the passenger, and yelled for him to halt. At that point, the passenger was running up a small incline on the shoulder of the road, hesitated and turned around to look at Gardiner, and then continued to run. Id. at 747. Officer Gardiner turned his attention to apprehending Daryl Shurn, and later put out a description of the man who had gotten away. Id. at 747-52. Some time later, Officer Crain returned to the scene with petitioner, who Officer Gardiner testified he recognized as the man who had gotten out of Daryl Shurn's vehicle and run from him. Tr. on Appeal, Vol. II, p. 755. Officer Gardiner testified there was "[n]o doubt whatsoever, none" in his mind that petitioner was the same man he had previously seen. Id. at 756.

As stated above, a federal court may grant habeas relief where a state court's evidentiary ruling "infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial of due process." Clark, 16 F.3d at 963 (citation omitted). To establish such a violation, petitioner's burden is "much greater than that required on direct appeal and even greater than the showing of plain error." Mendoza, 5 F.3d at 342.

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lineup was the same as the clothing and physical stature of the men they had observed the morning of the shooting. Tr. on Appeal, Vol. II, pp. 615, 646-51; 665-68.

The Court finds petitioner has not established that the Missouri Supreme Court's decision with respect to these issues resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. See Linehan, 315 F.3d at 924. Even if the lineup procedures were improperly suggestive, the Missouri Supreme Court employed the proper analysis, derived from Manson, and did not unreasonably apply clearly established federal law in determining that the resulting identifications were reliable. In deciding that testimony regarding the show up identification was reliable, the state court did not make a decision that was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. See Linehan, 315 F.3d at 924. Moreover, the Court finds the Missouri Supreme Court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id., 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Twelve.

L. Claim Thirteen - Unconstitutional Search.

Petitioner asserts as his thirteenth claim for relief that his conviction and sentence of death were imposed in violation of the Fourth, Fifth and Fourteenth Amendments because the trial court erred in overruling counsel's motion to suppress evidence that keys obtained from Daryl Shurn's car fit the doors, ignition, glove box and trunk of petitioner's vehicle.

Petitioner states that after the accident involving Shurn's car, the car was seized and a search warrant obtained. During execution of the warrant, a brown key case was among the items seized from Shurn's car. After petitioner's arrest, the car he was driving was towed from the Mansion Hills apartments parking lot and placed in police custody. Police officers then

took the keys obtained from Shurn's car and tried them to determine if they fit the doors and ignition of petitioner's vehicle. Petitioner argues this was a warrantless search of his vehicle which was not based on probable cause that the vehicle contained contraband, there were no exigent circumstances to support the search, and no police policies in place that would have called for the search. Thus, petitioner argues the key case should have been suppressed. Petitioner asserts that if probable cause had existed for the police to believe the keys fit his vehicle, they could have obtained a search warrant.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> After the crash, police found keys in the Shurn vehicle. In the meantime, Weaver's car, a Buick LeSabre, was found in the Mansion Hills parking lot. The LeSabre was towed from the parking lot and placed in police custody. The keys found in the Shurn vehicle were tried and found to fit the doors, ignition, glove box and trunk of the LeSabre.
>
> Weaver argues that no circumstances justified a warrantless search of his vehicle. Weaver does not seem to challenge the warrantless *seizure* of the vehicle. Here the vehicle was seized at the scene of a murder and was apparently used by Weaver as transportation to the scene of the crime. That justified the warrantless seizure of the vehicle.
>
> Checking the locks of the LeSabre to see if the keys found in the Shurn car fit the car found at the scene of the crime was not an unreasonable intrusion or violation of any expectation of privacy. Simply trying a key in an exterior lock

> of an automobile does not constitute a search. *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991); *United States v. Lyons*, 898 F.2d 210, 212-13 (1st Cir. 1990); *United States v. Grandstaff*, 813 F.2d 1353, 1358 n.5 (9th Cir. 1987). Because the officers had probable cause to seize the vehicle, they could also have searched the interior of the car for weapons and other instrumentalities of the crime without obtaining a warrant. *Chambers v. Maroney*, 399 U.S. 42, 48-52 (1970). This would include opening the glove box. This point is denied.

State v. Weaver, 912 S.W.2d at 521.

Petitioner's search claim is not cognizable in this proceeding. "A Fourth Amendment claim of an unconstitutional search or seizure is not cognizable in a habeas corpus action unless the state has not 'provided an opportunity for full and fair litigation' of the claim." Sweet v. Delo, 125 F.3d 1144, 1149 (8th Cir. 1997) (quoting Stone v. Powell, 428 U.S. 465, 494 (1976)), cert. denied sub nom Sweet v. Bowersox, 523 U.S. 1010 (1998). This Court is "not empowered to examine whether the Missouri courts made errors of law in deciding the Fourth Amendment issues argued by" petitioner. Id. (citing Willett v. Lockhart, 37 F.3d 1265, 1270 (8th Cir. 1994) (en banc), cert. denied sub nom Willett v. Norris, 514 U.S. 1052 (1995)). "A search and seizure claim is cognizable in a habeas action only if 'the state provided no procedure by which the prisoner could raise his Fourth Amendment claim, or the prisoner was foreclosed from using that procedure because of an unconscionable breakdown in the system.'" Id. (quoting Willett, 37 F.3d at 1273). Petitioner has not attempted to make such a showing in this case, and the record does not support it. It is clear petitioner had the opportunity for full and fair litigation on the Fourth Amendment

issue, as the Missouri Supreme Court affirmed the trial court's ruling on the issue. Petitioner may not relitigate that ruling here. See Newman v. Hopkins, 192 F.3d 1132, 1134-35 (8th Cir. 1999), vacated on other grounds, 529 U.S. 1084 (2000), reaff'd on remand, 247 F.3d 848 (8th Cir. 2001), cert. denied, 536 U.S. 915 (2002).

Even if the claim were cognizable as a due process claim under the Fifth Amendment, it is without merit. The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. The Missouri Supreme Court's decision rested on two alternative grounds. First, the state court held that merely trying the keys in the locks of petitioner's car did not constitute a search or violate any expectation of privacy, citing precedent from federal circuit courts of appeal. Second, the state court held that because the police had probable cause to seize petitioner's car, they could have searched its interior for weapons or other instrumentalities of the crime without obtaining a warrant, citing Chambers v. Maroney, 399 U.S. 42, 48-52 (1970) (automobile may be searched without a warrant in circumstances that would not justify warrantless search of house or office, if probable cause exists to believe the automobile contains articles that officers are entitled to seize).

The Supreme Court of the United States does not appear to have decided whether trying a key in a lock constitutes a search for purposes of the Fourth Amendment. Thus, the Missouri Supreme Court's decision that trying a key in a lock is not a search and does not implicate privacy concerns is not contrary to and does not violate clearly established federal law. The state court's alternative holding, that because the police had probable cause to seize petitioner's car they could have searched it for instrumentalities of the crime, is also not contrary to and does not violate clearly established federal law. See Chambers, 399 U.S. at 48.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable ~~application~~ of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Thirteen.

M. Claim Fourteen - Unconstitutional Application of Death Penalty.

Petitioner asserts as his fourteenth claim for relief that his conviction and sentence of death were imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the St. Louis grand jury that indicted him did not contain a fair cross-section of the community, as a result of systematic exclusion of non-whites from serving on the grand jury. At trial, the parties stipulated that the evidence presented and adduced on the systematic exclusion of non-whites from the grand jury presented in co-defendant Daryl Shurn's case would constitute the record for petitioner.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> Weaver claims that the composition of the grand jury resulted from systematic exclusion of nonwhites, resulting in underrepresentation of African-Americans. Essentially the same data supporting the claim were submitted in *State v. Shurn*, 866 S.W.2d 447, 455 (Mo. banc 1993). There the data were held to be unpersuasive. No precedential value would be gained by

> reconsidering the claim here. The point is denied.

Weaver, 912 S.W.2d at 521.

In State v. Shurn, 866 S.W.2d 447 (Mo. 1993) (en banc), the Missouri Supreme Court discussed the issue as follows:

> Shurn's first complaint relates to the racial composition of the grand jury that indicted him. At trial, he filed a motion to dismiss and quash the indictment, which alleged that the grand jury resulted from systematic exclusion of non-whites, women, and those 21 through 34 years of age. Shurn argued that this violated his equal protections rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and article I, §§ 2, 10 and 18(a) of the Missouri Constitution. He now contends that the trial court erroneously denied his motion because too few African-Americans served on the grand jury.
>
> To establish an equal protection claim in the context of grand jury selection, the defendant must prove that the grand jury selection procedure has "resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). The defendant must first show membership in a cognizable racial group singled out for different treatment. *Id.* Second, the defendant must show an underrepresentation "by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors,

over a significant period of time." *Id.* The burden is on the defendant to show a substantial underrepresentation of his group in order to make a prima facie case, and shift the burden to the state. *Id.* at 495.

Shum's evidence detailed the racial composition of seven grand jury pools, comprising 2,790 members with a known race. Of these, 186 members--or 6.67 percent--were African-American. Shum's evidence also detailed the racial composition of 10 grand juries, estimating that 11 blacks served on them. Because each grand jury has 12 jurors, the racial composition of the 10 grand juries was 9.17 percent black (Shum asserts the percentage of black grand jurors as 8.33 percent). Thus, the percentage of black grand jurors exceeded the percentage of blacks in the pool.

Moreover, a representative number of blacks served on grand juries. According to the stipulated census figures, blacks accounts for 11.26 percent of the population of St. Louis County. The disparity between the census of St. Louis County (11.26 percent black) and the racial composition of the grand juries referenced by Shum (9.17 percent black) is insufficient to establish a prima facie equal protection claim under *Castaneda*. *See, e.g.*, *Castaneda*, 430 U.S. at 495-96; *State v. Baker*, 636 S.W.2d 902, 909 (Mo. banc 1982), *cert. denied*, 459 U.S. 1183 (1983).

State v. Shum, 866 S.W.2d at 455 (footnote omitted).

The Court begins its analysis with the Missouri Supreme

Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

This claim presents a mixed issue of law and fact. See United States v. Sanchez, 156 F.3d 875, 879 (8th Cir. 1998). The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. The Missouri Supreme Court's decision rested on two factual findings. First, the state court found that the percentage of African-Americans who actually served on grand juries in St. Louis County during the relevant period exceeded the percentage in the grand jury pools. Second, the state court found that the racial composition of the grand jury pools was 6.67 percent African-American, the composition of grand juries was 9.17 percent African-American, and the percentage of African-Americans residing in St. Louis County was 11.26 percent. The Missouri Supreme Court concluded the percentage disparity was insufficient to establish a prima facie equal protection claim under the United States Supreme Court's decision in Castaneda v. Partida, 430 U.S. 482 (1977).

The Missouri Supreme Court in Shurn compared the disparity between the composition of the actual grand juries (9.17 percent African-American) and the county population (11.26 percent African-American), apparently examining

absolute disparity as opposed to comparative disparity.[15] The absolute disparity when comparing grand jury composition to county population is 2.09 percent, while the comparative disparity is 18.56 percent.[16] The absolute disparity when

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[15]"'Absolute disparity' describes the percentage-point difference between a group's representation in the general population and that in the jury pool. . . . Meanwhile, 'comparative disparity' measures 'absolute disparity' in terms of the group's relative size in the general population. One simply divides the 'absolute disparity' percentage by the percentage of the population represented by the group in question." United States v. Sanchez, 156 F.3d 875, 879 n.4 (8th Cir. 1998). The Eighth Circuit has stated that "the comparative disparity calculation provides a more meaningful measure of systematic impact *vis-a-vis* the 'distinctive' group: it calculates the representation of African Americans in jury pools relative to the African-American community rather than relative to the entire population." United States v. Rogers, 73 F.3d 774, 776-77 (8th Cir.), cert. denied, 517 U.S. 1239 (1996); but cf. Floyd v. Garrison, 996 F.2d 947, 949 (8th Cir. 1993) (declining to adopt comparative disparity analysis as a better means of calculating underrepresentation, citing Castaneda, 430 U.S. at 495-96).

[16]The absolute disparity between African-American county residents and African-American grand jury members is calculated as follows: 11.26 percent African-American county residents, less 9.17 percent African-American grand jury members (11.26 - 9.17 = 2.09). The comparative disparity is calculated as follows: 11.26 percent African-American county residents, less 9.17 percent on the grand jury panels, times 100, divided by the 11.26 percent African-American county residents (11.26 - 9.17 x 100 ÷ 11.26 = 18.56). See United States v. Rogers, 73 F.3d 774, 776 n.1 (8th Cir. 1996) (method of calculating comparative disparity).

comparing grand jury pool composition and the county population is 4.59 percent, while the comparative disparity is 40.76 percent.[17]

To establish an equal protection violation under these circumstances, a criminal defendant must show the jury selection process "(1) resulted in a substantial underrepresentation of a suspect class to which [the defendant] belongs, . . . and (2) is susceptible to abuse or is not racially neutral." United States v. Warren, 16 F.3d 247, 251 (8th Cir. 1994) (citing Castaneda, 430 U.S. at 494); see Floyd v. Garrison, 996 F.2d 947, 949 (8th Cir. 1993) (same). Discriminatory purpose is an essential element of an equal protection challenge to grand jury selection, and merely showing systematic disproportion alone is insufficient in such a challenge. See Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

The Missouri Supreme Court concluded there was no prima facie case of substantial underrepresentation shown, based on the absolute disparity between African-Americans on grand juries and in the county population. In reaching this conclusion, the Missouri Supreme Court referenced Castaneda, in which the United States Supreme Court found a substantial underrepresentation based on a forty percent absolute disparity

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[17]The absolute disparity between African American county residents and African-American grand jury pool members is calculated as follows: 11.26 percent African-American county residents, less 6.67 percent African-American grand jury pool members (11.26 - 6.67 = 4.59). The comparative disparity is calculated as follows: 11.26 percent African-American county residents, less 6.67 percent African-American grand jury pool members, times 100, divided by 11.26 percent African-American county residents (11.26 - 6.67 x 100 ÷ 11.26 = 40.76).

between Hispanics in the county population and those summoned for grand jury service. See Castaneda, 430 U.S. at 495; Floyd, 996 F.2d at 950.

Petitioner's equal protection claim is based on numbers derived using a comparative disparity analysis. When this analysis is employed, the disparity appears much more significant than when the absolute disparity analysis is used. Petitioner fails to acknowledge that the forty percent disparity he relies on was calculated in a different manner than the forty percent disparity the Supreme Court found to violate equal protection in Castaneda. If the same method were used in this case, the maximum absolute disparity would be 4.59 percent.[18] Moreover, even assuming petitioner established unreasonable representation of African-Americans in the grand jury pool, he has failed to provide any evidence from which this Court could find that the grand jury selection process was susceptible to abuse or was not racially neutral. See Warren, 16 F.3d at 252 (equal protection claim failed where defendant failed to provide evidence of defective jury selection procedure or racially biased procedure); Floyd, 996 F.2d at 949 (plaintiff failed to establish equal protection violation as he did not show a discriminatory purpose in the jury-selection process). In contrast, in Castaneda the Supreme Court's conclusion was bolstered by the fact that the Texas "key-man" system of selecting jurors was found by the Court to be "highly subjective." 430 U.S. at 495, 497; see United States v. Garcia, 991 F.2d 489, 491-92 (8th Cir. 1993). Petitioner has not even provided information in the record as to how grand juries are selected in St. Louis County, much less "pointed to a defect in the process itself that serves to exclude African-Americans." Warren, 16 F.3d at 252. Consequently, there can be no equal protection violation under the Fifth and Fourteenth Amendments.

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[18]See footnote 15, supra.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Fourteen.

N. Claim Fifteen: Unconstitutional Application of Death Penalty.

Petitioner asserts as his fifteenth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the trial court erred in overruling counsel's motion challenging the constitutionality of the Missouri death penalty statute. Petitioner states that the jury found the following aggravators: (1) the petitioner acted as an agent or employee and pursuant to the direction of others in killing Taylor; (2) the homicide involved depravity of mind and as a result was outrageously or wantonly vile, horrible or inhumane, and (3) Taylor was a potential witness in prosecutions involving Charles Shurn and Larry Shurn.[19]

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[19]The trial court gave the following aggravating circumstances instruction, Instruction No. 23:

> In determining the punishment to be assessed the defendant for the murder of Charles Taylor, you must first unanimously determine whether one or more of the following aggravating circumstances exists:

First, petitioner argues jury Instruction No. 23 contains

1. Whether the defendant murdered Charles Taylor for the purpose of the defendant receiving money or any other thing of monetary value from Charles Taylor or another person.

2. Whether the defendant, as an agent or employee of another person or persons and at their direction, murdered Charles Taylor.

3. Whether the murder of Charles Taylor involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

4. Whether Charles Taylor was a potential witness in past or pending prosecutions of Charles Shurn and/or Larry Shurn in Federal Court and was killed as a result of his status as a potential witness.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

a vague statutory aggravator that cannot withstand constitutional challenge under Maynard v. Cartwright, 486 U.S. 356, 362 (1988), which holds that the constitution requires a jury instruction to limit and channel the sentencer's discretion in order to adequately minimize the risk of a wholly arbitrary and capricious sentencing decision. Petitioner also argues that Instruction No. 23 failed to comply with MAI-CR 3rd 313.40, which requires that when depravity is submitted alone, the instruction must continue with at least one of the phrases constituting depravity. Petitioner contends that this instruction caused jury confusion, as evidence by the jury's request during deliberations that the trial court define the term "depravity." Petitioner also argues that trial counsel was ineffective for failing to object to Instruction No. 23.

Second, petitioner states that as one aggravating circumstance, the jury found he had acted as an agent or employee of others in the killing of Taylor. Petitioner contends the lack of particularities in defining the terms "agent" or "employee" allowed the jury to find for death in an arbitrary and capricious manner, particularly as this conclusion was unsupported by any evidence presented at trial.

Third, petitioner challenges the Missouri Supreme Court's proportionality review as denying him due process. Petitioner states that the Missouri Supreme Court disposed of the question of proportionality by referring to other cases involving arguably similar circumstances in which the death penalty was imposed. Petitioner states that the statute does not direct the court to consider only cases in which the death penalty was imposed and upheld, as such an approach can only lead to an increasing pool of death-eligible cases. Petitioner argues that the Missouri Supreme Court should instead use the "frequency" approach, under which it would review cases with similar circumstances in which the defendants received life imprisonment, as well as similar cases where the defendant received the death penalty. Defendant asserts that under this

approach, the Missouri Supreme Court would then be able to determine whether the death penalty was being imposed sufficiently often to justify affirming the sentence under review.

Petitioner presented these issues to the Missouri Supreme Court, which addressed the issues as follows:

> Weaver's fifteenth point makes a four-pronged attack on the constitutionality of the death penalty. He claims it is unconstitutional because of (1) vagueness of the aggravating factor of "depravity of mind," (2) inadequacy of proportionality review, ...

Weaver claims the "depravity of mind" aggravating factor is excessively vague.

> We do not have to decide whether, in this case, the depravity of mind aggravating factor was excessively vague because the jury found two valid statutory aggravating circumstances under § 565.032.2(12). They found he murdered a potential witness and acted as an agent for another. We will affirm a death sentence based on the finding of one valid statutory aggravating circumstance, regardless of the failure of another. *State v. Sloan*, 756 S.W.2d 503, 509 (Mo. banc 1988), *cert. denied*, 489 U.S. 1040 (1989).
>
> The claim of unconstitutionality in the proportionality review must also fail. The constitution does not require proportionality review. Rather, it is required by statute. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078 (1993); § 565.035, RSMo 1994. This Court has rejected the

> argument that it must engage in a statistical analysis of cases to determine whether the punishment is disproportional. *Ramsey*, 864 S.W.2d at 327-28. The Court's method of proportionality review does not violate Weaver's due process rights, his right to a fair trial or his right to be free from cruel and unusual punishment under the state or federal constitutions.

Weaver, 912 S.W.2d at 521-22.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

1. Depravity of Mind Instruction.

The Missouri Supreme Court's determination with respect to the depravity of mind instruction is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied.

The depravity of mind instruction as given was unconstitutionally vague because it had no qualification to curb the jury's discretion. See Harris v. Bowersox, 184 F.3d 744, 749-50 (8th Cir. 1999), cert. denied, 528 U.S. 1097 (2000);

Sloan, 54 F.3d at 1384. Although the Missouri Supreme Court had limited the depravity of mind instruction prior to petitioner's trial, see State v. Preston, 673 S.W.2d 1 (Mo.) (en banc), cert. denied sub nom Preston v. Missouri, 469 U.S. 893 (1984), it did not apply that limiting construction in this case and refused to rely on depravity of mind in affirming the sentence. Instead, the Missouri Supreme Court relied on the jury's finding of two other valid aggravating circumstances, that petitioner murdered a potential witness and acted as an agent for another. Weaver, 912 S.W.2d at 522.

The use of the vague depravity of mind instruction on aggravating circumstances does not invalidate the sentence. The error is harmless because two other aggravating circumstances remain:

> [T]he sentencing process in Missouri does not involve a simple weighing of aggravating and mitigating circumstances. Once a single aggravating circumstance is found in Missouri, the factfinder is free to consider all the evidence to determine whether the death penalty is appropriate.

Sloan, 54 F.3d at 1385 (citing Stringer v. Black, 503 U.S. 222, 232 (1992) ("In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty")); see Harris, 184 F.3d at 749-50 (even if depravity of mind instruction was unconstitutionally vague, the penalty phase verdict was reliable beyond a reasonable doubt because the jury found other aggravating circumstances); Ramsey v. Bowersox, 149 F.3d 749, 754-55 (8th Cir. 1998), cert. denied, 525 U.S. 1166 (1999) (same). Therefore, the Court concludes that petitioner is not entitled to relief on this aspect of Claim Fifteen.

Petitioner's claim that his trial counsel rendered ineffective assistance by failing to object to Instruction No. 23 must fail because petitioner cannot establish he was prejudiced as a result. Strickland, 466 U.S. at 691. Petitioner cannot show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

2. Agency as an Aggravating Circumstance.

One of the three aggravating factors the jury relied upon in sentencing petitioner to death was "agency," i.e., that petitioner was acting at the direction of others in killing Taylor. Petitioner presented a claim to the Missouri Supreme Court that the "agent or employee of another person or persons" aggravating circumstance was vague and unsupported by the evidence. The state court implicitly rejected the claim, based on its conclusion that the agency aggravator was valid. See Weaver, 912 S.W.2d at 522. As a result, this Court will address the claim on its merits. See Coleman, 501 U.S. at 732-35 (in the absence of a clear and express statement declaring otherwise, an ambiguous state court decision is presumed to be made on the basis of the court's belief that federal law required such decision, thus permitting the federal habeas court to address the petition).

Petitioner contends the terms "agent" and "employee" are too vague and therefore allowed the jury to find for death in an arbitrary and capricious manner. The Missouri Supreme Court has stated that the agent/employee aggravating circumstance is "straightforward and easily understood." See State v. Blair, 638 S.W.2d 739, 758 (Mo.1982) (en banc). The Missouri Supreme Court's conclusion that the agency aggravator was valid is not contrary to and does not involve an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

Petitioner argues that agency was not established as there was no evidence presented that he acted as the agent of another, and therefore this aggravating factor is invalid. Petitioner's argument ignores the testimony of Robert "Dutch" Tabler, who testified that petitioner told him he was a "hit man," and that petitioner, along with Daryl Shurn, had killed Taylor because he was retaining certain real estate that belonged to the Shurns. There was evidence that petitioner knew Daryl Shurn, and Tabler also testified that petitioner knew Taylor was refusing to sign over real estate the Shurns wanted back. This testimony serves to support the jury's finding that petitioner acted as an agent of another person or persons and at their direction in murdering Taylor. The Missouri Supreme Court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Linehan, 315 F.3d at 924.

3. Inadequate Proportionality Review.

Petitioner contends that the manner in which the Missouri Supreme Court conducted a proportionality review of his death sentence violated his due process rights. The Supreme Court of the United States has held that the Eighth Amendment does not require a state appellate court to undertake a proportionality review. See Pulley v. Harris, 465 U.S. 37, 50-51 (1984). The Missouri legislature, however, has imposed a requirement for proportionality review of all Missouri cases where the death penalty is imposed. Mo. Rev. Stat. § 565.035. "While the review is not mandated by the federal Constitution, once in place it must be conducted consistently with the Due Process Clause." Kilgore v. Bowersox, 124 F.3d 985, 996 (8th Cir. 1997), cert. denied, 524 U.S. 942 (1998). The Missouri Supreme Court reviewed petitioner's case and concluded the sentence "when compared to similar cases, is neither excessive nor disproportionate." Weaver, 912 S.W.2d at 523. The Constitution does not require this Court to look behind that

conclusion to consider the manner in which the Missouri Supreme Court conducted its review. See Tokar v. Bowersox, 198 F.3d 1039, 1052 (8th Cir. 1999), cert. denied sub nom Tokar v. Luebbers, 531 U.S. 886 (2000); see also Ramsey, 149 F.3d at 754 (Missouri's proportionality review does not violate the Eighth Amendment, due process, or equal protection of the laws).

Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied on all aspects of Claim Fifteen.

O. Claim Sixteen: Adopting State's Findings.

Petitioner asserts as his sixteenth claim for relief that his sentence of death was imposed in violation of the Fifth and Fourteenth Amendments because the motion court hearing his Rule 29.15 motion failed to conduct an adequate review of the claims contained in his postconviction motion. Petitioner states that the motion court adopted verbatim the State's proposed findings, and thus failed to conduct an independent, thorough review of his claims, in violation of his due process rights.

The Missouri Supreme Court addressed this claim as follows:

> In his sixteenth point, Weaver argues that the judgment in the post-conviction hearing was invalidated because "most of the 'findings' either adopted verbatim or with only minor editorial changes [the state's] proposed findings." This Court's review is limited to determining whether the motion court clearly erred. *Rule 29.15(j).* While trial courts must act independently in making findings of fact and conclusions of law, it is not error for a trial court to request or receive proposed findings and, in appropriate cases, to adopt those findings. The

point is denied.

State v. Weaver, 912 S.W.2d at 522.

Under § 2254, a federal court "[s]hall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Kenley, 228 F.3d 934 (quoting 28 U.S.C. § 2254). The law is well settled that "infirmities in the state's post-conviction remedy procedure cannot serve as a basis for setting aside a valid original conviction. . . . Errors or defects in the state post-conviction proceedings do not, *ipso facto*, render a prisoner's detention unlawful or raise constitutional questions cognizable in habeas corpus proceedings." Id. at 938 (quoting Williams, 640 F.2d at 143-44).

Petitioner's sixteenth claim for habeas relief asserts nothing more than an infirmity in the state's postconviction process. As such it is not cognizable in the instant § 2254 proceedings and will be denied.

P. Claim Seventeen: Acquittal First.

Petitioner asserts as his seventeenth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because jury Instruction No. 16 emphasized the offense of first degree murder and created a substantial risk that the sentencer's decision would be for the greater charged offense, in violation of his due process rights and his right to be free from cruel and unusual punishment.

The Missouri Supreme Court addressed this claim as follows:

> Various claims are raised in his seventeenth through twenty-first points which have been argued and found to be without merit in recent cases before this Court. Specifically, Point XVII argues that our pattern instructions, which tell the jury "If you do not find the defendant guilty of murder in the first degree, you must consider whether or not he is guilty of murder in the second degree," is an "acquittal first" instruction and violates due process. This claim has recently been denied. *State v. Wise*, 879 S.W.2d 494, 517 (Mo. banc 1994), *cert. denied* 513 U.S. 1093 (1995). . . . No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

"As a general rule, jury instructions do not form a basis for habeas corpus relief." Williams v. Lockhart, 736 F.2d 1264, 1267 (8th Cir. 1984) (citations omitted). Federal habeas relief is available only when a petitioner establishes that improper instructions resulted in a "fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962). "The burden of demonstrating that errors in jury instructions were sufficiently prejudicial to 'support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.'" Williams, 736 F.2d at 1267 (quoting Henderson v. Kibbe, 431 U.S. 145, 154 (1977)). Petitioner "must show that the alleged error so infected the entire trial that he was deprived of his right to due process." Id. (citing Cupp v. Naughton, 414 U.S. 141, 147 (1973)).

Petitioner has not carried the heavy burden of

establishing that any alleged error in the instructions rose to the level of constitutional significance. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Seventeen.

Q. Claim Eighteen: Failure to Conduct Individual Voir Dire.

Petitioner asserts as his eighteenth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the trial court erred in denying petitioner's motion for individual voir dire. Petitioner states that in his case, voir dire of the venire was conducted in panels of six venirepersons at a time. Petitioner asserts that because of this method of conducting voir dire, jurors heard prejudicial statements made by other venirepersons, and had there been individual voir dire, trial counsel would have been in a better position to thoroughly question the individual jurors regarding pretrial publicity.

The Missouri Supreme Court addressed this claim as follows:

> In Point XVIII Weaver argues that he was denied due process because individual voir dire was not allowed of the jurors. This Court has repeatedly rejected that claim. *Parker*, 886 S.W.2d at 921; *State v. Whitfield*, 837 S.W.2d 503, 509 (Mo. banc 1992); *State v. Ervin*, 835 S.W.2d 905, 917 (Mo. banc 1992). . . . No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached

the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924.

The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. The Missouri Supreme Court has held that individual voir dire is not required in death penalty cases. See State v. Ervin, 835 S.W.2d 905, 917 (Mo. 1992) (en banc), cert. denied, 507 U.S. 954 (1993). In reviewing the method of voir dire examination conducted in cases tried before a state court, this Court's authority is "limited to enforcing the commands of the United States Constitution." Mu'Min v. Virginia, 500 U.S. 415, 422 (1991); see Byrd v. Armontrout, 880 F.2d 1, 10 (8th Cir. 1989) (constitutionally permissible to question venire members in panels of twelve, and to conduct the death qualification process in panels of twelve), cert. denied, 494 U.S. 1019 (1990); see also Trujillo v. Sullivan, 815 F.2d 597, 606-07 (10th Cir.) (individual sequestered voir dire during death qualification is not constitutionally mandated), cert. denied, 484 U.S. 929 (1987). Based on this authority, there is no constitutional requirement for individual voir dire, and it is constitutionally permissible to conduct voir dire in panels of six jurors. "This procedure was within the trial court's discretion." State v. Guinan, 665 S.W.2d 325, 329 (Mo.) (en banc), cert. denied, 469 U.S. 873 (1984). The record contains no evidence that use of this procedure produced any prejudice.

Moreover, the trial court's conclusion that the jury was not prejudiced by remarks made during voir dire is a factual determination entitled to the statutory presumption of

correctness. 28 U.S.C. § 2254(d); Byrd v. Armontrout, 686 F. Supp. 743, 764 (E.D. Mo. 1990); aff'd, 880 F.2d 1 (8th Cir. 1989), cert. denied, 494 U.S. 1019 (1990). The Court's review of the record supports the conclusion that voir dire did not result in a partial jury. Based on the Court's own review of the voir dire record, the Court concludes the record is devoid of any evidence of a venireperson who was prejudiced by a fellow venireperson's prior knowledge of the case or other statement.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Eighteen.

R. Claim Nineteen: Separate Penalty Phase Jury.

Petitioner asserts as his nineteenth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the trial court erred in denying petitioner's motion to empanel a separate penalty phase jury. Petitioner states the motion should have been granted because he was entitled to be tried by a jury composed of jurors who were less likely to convict than those who had been exposed to the evidence improperly presented to the trial jury in violation of petitioner's constitutional rights. Petitioner asserts that "numerous evidentiary and constitutional errors" committed by the trial court allowed the jury to consider evidence and facts admitted in violation of petitioner's constitutional rights, and caused it to recommend a sentence of death.

The Missouri Supreme Court addressed this claim as follows:

> In his nineteenth point, Weaver claims that he should have a separate jury to determine punishment. This claim has also often been rejected by this Court. . . . No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924.

The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. The United States Supreme Court has held that allowing death-qualified juries to determine guilt does not violate any of a defendant's constitutional rights. Lockhart v. McCree, 476 U.S. 162 (1986); see McDowell v. Leapley, 984 F.2d 232, 233-34 (8th Cir. 1993) (rejecting contention that death-qualified jury is more likely to convict). The Missouri Supreme Court has long held that Missouri's statutory scheme, which provides for a single jury to determine guilt and punishment in a death penalty case, does not violate any constitutional protections. See, e.g., State v. Wise, 879 S.W.2d 494, 514 (Mo. 1994) (en banc), cert. denied, 513 U.S. 1093 (1995); State v. Roberts, 709 S.W.2d 857, 868 (Mo.) (en banc),

cert. denied, 479 U.S. 946 (1986). Moreover, this Court has found that the trial court's evidentiary rulings did not violate either a specific constitutional provision or petitioner's due process rights. Petitioner's contention that the jury considered evidence and facts admitted in violation of his constitutional rights in its sentencing deliberations is without support in the record.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Nineteen.

S. Claim Twenty: Cautionary Instruction.

Petitioner asserts as his twentieth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the trial court erred in refusing to provide a cautionary instruction necessary to ensure that petitioner's sentence was not determined in an arbitrary and capricious manner. Petitioner asserts that the cautionary instruction would have insured that the jury was not prejudiced by the death qualification questions that were asked of them prior to the beginning of trial. Petitioner asserts that the cautionary instruction was needed because death qualification without proper explanation violated the presumption of innocence, and committed jurors to find petitioner guilty of first degree murder and to vote for death.

The Missouri Supreme Court addressed this claim as

follows:

> Weaver's twentieth claim is that the trial court erred in failing to give a non-MAI cautionary instruction. Again, that claim has been recently denied. *Parker*, 886 S.W.2d at 921; *State v. Kilgore*, 771 S.W.2d 57, 63 (Mo. banc 1989). . . . No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924.

The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. As stated above, the United States Supreme Court has held that allowing death-qualified juries to determine guilt does not violate any of a defendant's constitutional rights. Lockhart, 476 U.S. 162; McDowell, 984 F.3d at 234. Petitioner's claim that a cautionary instruction is required in order to protect his due process rights is premised on the theory that a death-qualified jury is inclined to find a criminal defendant guilty and to impose the death penalty. Lockhart squarely rejects that theory. Petitioner's proposed instruction indicated that death

qualification questions are mandatory and do not imply guilt.[20]

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[20]The proffered instruction (Supp. L.F. at 74-75) stated:

> Ladies and Gentlemen of the jury, the process we are about to begin is known as voir dire. The attorneys for the State and the defendant will ask you questions regarding your qualifications to serve on this jury. You should understand that although it is your duty as a citizen to serve on juries, it is also your duty as a citizen not to serve on a jury if there is any reason whatsoever that you cannot do so in fairness to the State, the defendant or yourself. What is important is that you be as honest as you can be in your responses to questions put to you by counsel. You are not here to be judged and you will not be. It should not be an embarrassment to you in any way if you are excused from this case. Many of you will be. Many persons are excused in every case. It does not mean that you cannot serve on a future jury. If you are excused it will mean that you have been honest and forthright in your feelings and that is what we ask of you.
>
> This is a case in which the defendant, WILLIAM WEAVER, is charged with two [sic] counts of first degree murder. As in all first degree murder cases, one possible penalty is the death penalty. Because of that possibility, it is necessary that counsel ask you certain questions about your views regarding the death penalty. The death penalty is an issue as to which people have varying opinions. Some favor it. Some oppose it. There are strong arguments for either

The Missouri Supreme Court has rejected the claim that a non-MAI cautionary instruction is required to protect a capital murder defendant's due process rights, on the basis that MAI-CR 3d 300.02, which was read to the jury in this case as Instruction No. 4,[21] states that the charge of any offense creates

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position. You will be asked your opinion and I would urge you to be as candid and honest as you can be in your answer.

The questions counsel will be asking you are asked in every case of first degree murder. The law requires that such questions be asked of you. The inquiry has no relation whatsoever to whether or not WILLIAM WEAVER is or is not guilty of the offense charged. As he sits before you he is presumed to be innocent. The State must prove his guilt to you beyond a reasonable doubt before you can find him guilty.

Since we will only have the opportunity to question yoou [sic] regarding your feeling about the death penalty at this state [sic] of the trial, before the State produces any evidence, I must caution you that you should not conclude that just because the attorneys ask you about a possible penalty that they believe WILLIAM WEAVER is guilty. It is simply a part of the jury selection process that occurs in every such case. Does everyone understand? Do you have any questions?

[21]Instruction No. 4 stated as follows:

The charge of any offense is not evidence, and it creates no inference that any offense was

no inference that any offense was committed or that the defendant is guilty, and that the defendant is presumed innocent until found guilty. See State v. Parker, 886 S.W.2d 908, 921 (Mo. 1994) (en banc).

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme

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committed or that the defendant is guilty of an offense.

The defendant is presumed to be innocent unless and until, during your deliberations upon your verdict, you find him guilty. This presumption of innocence places upon the state the burden of proving beyond a reasonable doubt that the defendant is guilty.

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leave you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a defendant is guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty.

L.F. at 118.

Court of the United States. Linehan, 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Twenty.

T. Claim Twenty-One: Reasonable Doubt Instructions.

Petitioner asserts as his twentieth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the reasonable doubt instructions given by the trial court, Instruction Nos. 4 and 20, did not contain language sufficient to protect his due process rights and the constitutional prohibition against cruel and unusual punishment.[22] Petitioner states that the language of

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[22]See footnote 19, supra, for the text of Instruction No. 4. Instruction No. 20 read as follows:

> The law applicable to this stage of the trial is stated in these instructions and instructions numbered 1 and 2 which the Court read to you during the first stage of the trial. All of these instructions will be given to you to take to your jury room for use during your deliberations on punishment.
>
> You must not single out certain instructions and disregard others or question the wisdom of any rule of law.
>
> The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.
>
> In these instructions, you are told that in order to consider the death penalty, you must find

these instructions suggests a higher degree of doubt than is constitutionally required for acquittal and a punishment other than death. Petitioner asserts that the statement the law does not require proof which "overcomes every possible doubt" could have caused a reasonable juror to interpret the instructions to allow a finding of guilty and punishment of death based on a degree of proof below that required by law.

The Missouri Supreme Court addressed this claim as follows:

> Finally, Weaver challenges the instruction on reasonable doubt. This complaint has been

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> beyond a reasonable doubt certain propositions relating to aggravating circumstances. The burden of causing you to find these propositions beyond a reasonable doubt is upon the state.
>
> A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the truth of a proposition. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a proposition is true, then you may so find. If you are not so convinced, you must give the defendant the benefit of the doubt and must not find such proposition to be true.

L.F. at 139.

> presented and denied on numerous occasions. No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

The State argues that this claim is Teague-barred.[23] The Eighth Circuit has addressed similar challenges to Missouri's reasonable doubt instruction, and in most instances has concluded the challenges are Teague-barred. See, e.g., Ramsey, 149 F.3d at 757-78; Murray, 34 F.3d at 1382. In a more recent opinion, the claim was not Teague-barred because the petitioner based his challenge on Supreme Court precedent that was established before his conviction became final. See Harris, 184 F.3d at 750-52. In Harris, the Eighth Circuit examined the language petitioner challenges here and found it does not unconstitutionally weaken the reasonable doubt standard. See Harris, 184 F.3d at 750-52 (Missouri reasonable doubt instruction "adequately conveyed the jury's obligation that it could convict [petitioner] only upon finding him guilty beyond a reasonable doubt.").

Based on the foregoing precedent, the Court need not decide whether petitioner's claim is Teague-barred. In either case, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue was contrary to or involved an unreasonable application of clearly established

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[23]"In Teague v. Lane, a plurality of the United States Supreme Court held that as a general rule, habeas corpus petitioners cannot gain the benefit of a new rule of constitutional procedure unless the rule is dictated by precedent existing at the time the petitioner's conviction became final. 489 U.S. 288, 301 (1989)." Harris v. Bowersox, 184 F.3d 744, 750 n.5 (8th Cir. 1999).

federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Twenty-One.

Request for Evidentiary Hearing.

"A section 2255 petition can be dismissed without an evidentiary hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusory." Evans v. United States, 220 F.3d 549, 551 (8th Cir. 2000).

Petitioner requests an evidentiary hearing on his petition for writ of habeas corpus. Petitioner does not specify what facts he seeks to prove. Because the instant petition was filed after the enactment of the AEDPA, its provisions govern the standards for evidentiary hearings. See Weaver, 241 F.3d at 1029. "A habeas petitioner is entitled to an evidentiary hearing under circumstances narrowly circumscribed by the provisions of 28 U.S.C. § 2254(e)(2)." Johnston v. Luebbers, 288 F.3d 1048, 1058 (8th Cir. 2002), cert. denied sub nom Johnston v. Roper, 123 S. Ct. 983 (2003). This section provides "that where a habeas petitioner 'has failed to develop the factual basis of a claim in State court proceedings,' the district court cannot hold an evidentiary hearing unless the petitioner shows that his case falls within one of two exceptions." Id. "[T]he initial inquiry must be whether the petitioner failed to develop his claim in state court. A petitioner cannot be said to have failed to develop relevant facts if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings." Id. (internal punctuation and citation omitted).

This Court concludes petitioner has not shown that any claim of the petition requires further evidentiary development

for its resolution. Petitioner has failed to demonstrate that an evidentiary hearing is warranted under the applicable standards set forth in 28 U.S.C. § 2254(e)(2). Accordingly, petitioner's request for an evidentiary hearing will be denied.

VI. Conclusion and Certificate of Appealability.

For the reasons stated above, the Court finds that petitioner William Weaver is entitled to a writ of habeas corpus vacating his sentence of death on the ground presented in portions of Claim Two: that the prosecutor's improper penalty phase closing argument violated petitioner's due process rights. The Court finds that all other claims for habeas relief are either procedurally barred or fail on the merits, and must be denied.

Under 28 U.S.C. § 2253, as amended by the AEDPA, "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253 is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). "When a district court dismisses the petition based on procedural grounds without reaching the prisoner's underlying constitutional claim," a certificate of appealability should issue when the prisoner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id..

Upon careful review of the record, the Court finds petitioner has not demonstrated that reasonable jurists would (1) find the Court's assessment of the constitutional claims debatable or wrong; or (2) would find it debatable whether the Court was correct in its procedural rulings, and therefore the Court does not reach the issue whether reasonable jurists would

find it debatable that the petition states a valid claim of the denial of a constitutional right. See Slack, 529 U.S. at 484-85. The Court therefore concludes petitioner is not entitled to a certificate of appealability on his other claims.

Accordingly,

IT IS HEREBY ORDERED that petitioner William Weaver's First Amended Petition for Writ of Habeas Corpus is **GRANTED** as to the sentence of death only, based on portions of Claim Two as discussed above, and **DENIED** in all other respects. Weaver's death penalty is vacated, and he must either be sentenced to life in prison without the possibility of parole or must be given a new trial on the state's request for the death penalty. [Doc. 15]

IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability.

An appropriate judgment will accompany this memorandum and order.

CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 7th day of May, 2003.